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Supreme Court of the United States

October Term, 1977

No. 78-153

WASTE MANAGEMENT OF WISCONSIN, INC., d/b/a CITY DISPOSAL COMPANY,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin and Appendix

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The petitioner, WASTE MANAGEMENT OF WISCONSIN, INC., d/b/a CITY DISPOSAL COMPANY by its attorneys FRIEBERT & FINERTY by ROBERT H. FRIEBERT respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Wisconsin entered in this proceeding on January 3, 1978.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at *State v. Waste Management of*

Wisconsin, Inc., d/b/a City Disposal Company, 81 Wis. 2d 555, 261 N.W.2d 147 (1978). A copy of this opinion appears in the appendix at 1.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on January 3, 1978. A timely motion for a rehearing was filed on January 23, 1978 together with a motion for an extension of time within which to serve and file a brief in support of the motion. The Wisconsin Supreme Court granted the extension of time to file the brief in support of the motion to February 13, 1978. A copy of that order dated January 23, 1978 appears at appendix, p. 22. On February 13, 1978, the petitioner timely filed its Brief in Support of Motion for Rehearing. On March 3, 1978, the Wisconsin Supreme Court denied the motion for rehearing. A copy of the decision of the Wisconsin Supreme Court denying the motion for rehearing appears at appendix, p. 23. Within 90 days after the denial of the motion for rehearing, the petitioner filed a timely application for extension of time in which to file a petition for a writ of certiorari. On May 4, 1978, Associate Justice John Paul Stevens executed an Order Extending Time to File a Petition for Writ of Certiorari to and including July 31, 1978. The order appears at appendix, p. 24.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the decision of the Wisconsin Supreme Court and the trial court violate the petitioner's right against

being twice put in jeopardy for the same offense as guaranteed to the petitioner by the Fifth and Fourteenth Amendments to the United States Constitution as well as the petitioner's right to due process of law as guaranteed to the petitioner by the Fourteenth Amendment to the United States Constitution in that during the first trial of the petitioner which resulted in a mistrial due to a hung jury, the prosecuting attorney engaged in prosecutorial misconduct to such an extent as to constitute "prosecutorial overreaching?"

2. Does the decision of the Wisconsin Supreme Court and the trial court violate the petitioner's right to be secure against unreasonable searches and seizures as guaranteed to the petitioner by the Fourth and Fourteenth Amendments to the United States Constitution and the petitioner's right to due process of law as guaranteed to the petitioner by the Fourteenth Amendment to the United States Constitution in that the State engaged in prosecutorial misconduct in a hearing to determine whether there had been any illegal electronic surveillance either by the knowing use of false testimony or by obtaining testimony with a reckless disregard of truth and whether such misconduct created a presumption of wrongdoing?

3. Does the decision of the Wisconsin Supreme Court and the trial court violate the petitioner's right to the presumption of innocence, its right to have the State prove every element of the offense beyond a reasonable doubt, its right to require the State to prove an effect upon commerce in a Sherman Act case setting as guaranteed to the petitioner by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that the decision of the Wisconsin courts is in conflict with decisions of this Court and particularly the decision of this

Court in *United States v. United States Gypsum Co.*, — U.S. — (1978) because the trial court instructed the jury that they could presume that a person intends the natural and probable consequences of its deliberate acts, the trial court failed to instruct the jury that the State must prove an effect upon commerce even though the grand jury alleged in the indictment an effect upon commerce and because the trial court refused to instruct the jury that evidence of competition between the alleged co-conspirators creates an inference that there never was a conspiracy?

4. Does the decision of the Wisconsin Supreme Court violate the petitioner's right to a full and fair hearing with respect to its claims of illegal electronic surveillances as guaranteed to the petitioner by the Fourth and Fourteenth Amendments to the United States Constitution?

5. Does the decision of the Wisconsin Supreme Court violate the petitioner's right to be secure against unreasonable searches and seizures as guaranteed to the petitioner by the Fourth and Fourteenth Amendments to the United States Constitution in that the Wisconsin Supreme Court and the trial court utilized affidavits which do not comply with federal standards in refuting a *prima facie* showing of the existence of radio frequency signals emanating from one of the telephones of the petitioner and the Wisconsin Supreme Court in its decision failed to shift the burden of proof to the State?

6. Does the decision of the Wisconsin Supreme Court violate the petitioner's right either to be indicted by a grand jury or to be charged by utilization of a procedure whereby probable cause is found by a neutral party as guaranteed to the petitioner by the Fifth and Fourteenth Amendments to the United States Constitution?

7. Does the decision of the Wisconsin Supreme Court violate the petitioner's right to be tried upon charges as presented by the grand jury instead of amended charges as guaranteed to the petitioner by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that the trial court amended the charging paragraph of the indictment to charge a different crime and the trial court, in its instructions to the jury, effectively deleted a paragraph from the indictment which had alleged an effect upon commerce?

8. Does the decision of the Wisconsin Supreme Court violate the petitioner's right to due process of law as guaranteed to the petitioner by the Fourteenth Amendment to the United States Constitution in that an agreed-upon jury instruction was amended during the course of the closing argument of counsel for the petitioner?

9. Does the decision of the Wisconsin Supreme Court violate the petitioner's right to due process of law as guaranteed to the petitioner by the Fourteenth Amendment to the United States Constitution in that the prosecuting attorney interrupted the closing argument of counsel for the petitioner and effectively stated to the jury that evidence existed which would be harmful to the petitioner or that the petitioner was responsible for the denial of the receipt of such evidence coupled with the failure of the trial court to give appropriate admonitions to the jury to disregard such "testimony"?

10. Does the decision of the Wisconsin Supreme Court violate the petitioner's right to due process of law as guaranteed to the petitioner by the Fourteenth Amendment to the United States Constitution in that the State failed to disclose exculpatory evidence to the grand jury?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WISCONSIN STATUTES INVOLVED

Section 133.01, Wisconsin Statutes:

Unlawful contracts; conspiracies.

(1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit

for each such offense not less than $100 nor more than $5,000. Any such person, corporation, copartnership, trustee or association shall also be liable to any person transacting or doing business in this state for threefold the damages he may sustain by reason of the doing of anything forbidden by this section and the cost of suit including a reasonable attorney's fee. As used in this section, the words "article or commodity in general use in this state" includes newspapers, magazines, periodicals, and advertising, including radio advertising. Nothing in this section or section 133.21 shall be construed as abridging the liberty of speech or of the press guaranteed by article I, section 3, of the constitution.

(2) The department of justice shall enforce this section and bring an action for the recovery of the forfeiture whenever complaint is made to the attorney general and evidence produced to his satisfaction that there has been a violation. Any district attorney shall institute such actions or proceedings as the attorney general deems necessary to recover any forfeiture incurred on account of the violation of this chapter. A representative of the department of justice designated by the attorney general may appear as counsel in any such case.

(3) Whoever violates sub. (1) may be fined not more than $5,000 or imprisoned not more than 5 years or both.

STATEMENT OF THE CASE

This case involves the conviction of the petitioner for violating §133.01(1), Wis. Stats., the Wisconsin "little" Sherman Act. The petitioner was indicted by a grand jury sitting in Madison, Wisconsin on February 28, 1973, along with two of its employees, Peter Abeles and McKinley Standridge. The petitioner was tried with one of its employees, McKinley Standridge.

The petitioner and Mr. Standridge were first prepared for trial on June 3, 1974 before the Honorable W. J. Jackman, Circuit Judge, Dane County, Wisconsin. However, a mistrial was declared due to the inability to choose a jury. A second mistrial was declared on October 5, 1974, when the jury reported that it was deadlocked with respect to both the petitioner and Mr. Standridge. The case was then reassigned to the Honorable Norris E. Maloney, Circuit Judge, Dane County, Wisconsin. At the second complete trial, the jury acquitted Mr. Standridge and convicted the petitioner, WASTE MANAGEMENT OF WISCONSIN, INC. d/b/a CITY DISPOSAL COMPANY. Post conviction motions were denied. A $4,000 fine was imposed by the trial court.[1] An appeal was taken to the Wisconsin Supreme Court and the conviction was affirmed.

Prior to November 15, 1971, the principal competitors in the City of Madison engaged in solid waste hauling were: (1) James Pellitteri; (2) Phil Pellitteri, James' uncle; (3) Jerry Beecher; (4) Richard Schultz; and (5) Eckl Sanitation. The petitioner was not actively competing in the City of Madison prior to November 15, 1971. On November 15, 1971, the petitioner purchased Phil Pellitteri's business and on December 15, 1971 the petitioner purchased Eckl Sanitation thereby acquiring approximately 60% of the Madison market. The petitioner, Waste Management, engaged in business in Madison under the name City Disposal Company. James Pellitteri had approximately 25% of the market while Jerry Beecher and Richard Schultz shared the remaining 15% of the market equally.

According to the testimony principally of James Pellitteri, commencing in November of 1971, James Pellitteri was asked by Peter Abeles not to take customers of the

[1] Peter Abeles has not been tried to date. Extradition proceedings are still pending.

petitioner while the petitioner was merging the routes of the two companies which is was purchasing. By January 15, 1972, James Pellitteri according to his testimony, became concerned about his actions and sought advice from his attorney, Bruce Gillman. Shortly after this, Mr. Gillman contacted the office of the Attorney General of Wisconsin and produced tape recordings of telephone conversations between James Pellitteri and Mr. Abeles for the consideration of the Attorney General's office. At the request of the office of the Attorney General, James Pellitteri continued to produce tapes of telephone conversations during the ensuing twelve months.

Sometime in the 1960's, James Pellitteri and Jerry Beecher had an agreement not to take each other's accounts and to notify each other if either received a call from the other's customers. At some point, Mr. Beecher was told by James Pellitteri to contact Peter Abeles at City Disposal.[2] James Pellitteri's corporation and Jerry Beecher's business were alleged to be unindicted co-conspirators in the indictment involved in this case.

Richard Schultz testified that in February of 1973 he was contacted by McKinley Standridge of City Disposal and that they had lunch together. According to Mr. Schultz, during this lunch, Mr. Standridge advised Mr. Schultz about the arrangement concerning City Disposal, James Pellitteri and Jerry Beecher and asked him to join into this understanding. According to Mr. Schultz, he refused the invitation.

Mr. Standridge testified that he had no such conversation with Mr. Schultz during this luncheon meeting at

[2] The precise date of this contact was a subject of dispute in the trial with the petitioner contending that Mr. Beecher was so advised by James Pellitteri after James Pellitteri beame an agent of the State of Wisconsin.

Namio's. Mr. Standridge also testified that he would freely give price information on current accounts to anybody who called since his prices were not a secret and that he never agreed and knows of no agreement not to take accounts. Mr. Standridge was ultimately acquitted by the jury.

The petitioner consumed a substantial amount of time during the trial to demonstrate that there was fierce competition in Madison, Wisconsin before, during and after the period of the alleged conspiracy and that there was no impact on commerce with respect to any exchange of price information. In fact, the petitioner proved that it lost nearly $50,000 of annual business during the period of the alleged conspiracy. The petitioner proved that when James Pellitteri and Jerry Beecher obtained price information from the petitioner, armed with that information, they would often undercut or attempt to undercut the petitioner to take away business.

Toward the end of the first trial before Judge Jackman which resulted in a hung jury and a mistrial the defendant, McKinley Standridge testified on his own behalf. Assistant Attorney General Paul Gossens, while cross examining Mr. Standridge, asked the following:

"Q. (By Mr. Gossens) Did you know that Waste Management or by its previous name had ever been involved in bidrigging?

Mr. Friebert (counsel for petitioner): Your Honor, I object and move for mistrial.

Mr. Sutton (counsel for Mr. Standridge): I move for directed verdict. That's intentional.

The Court: He may answer.

A. No, I did not know.

Q. You didn't know that at all?
A. No.

The Court: The jury is instructed to disregard that question entirely.

Mr. Sutton: Will you rule on my motion?

Mr. Friebert: Motion for mistrial.

The Court: Denied.

Mr. Friebert: Both motions?

The Court: Yes." (R. 1367)

On the morning of the next day of that first jury trial, the petitioner pointed out to Judge Jackman, outside the presence of the jury, that the petitioner had never been convicted anywhere in the country of bidrigging. In Milwaukee, in the 1960's, a corporation which had been purchased by Waste Management was a defendant in a *civil* case brought by the State which alleged certain improprieties which allegedly occurred prior to the purchase by Waste Management. An interim consent decree was entered. Ultimately the entire case was dismissed.

Assistant Attorney General Gossens stated that his question merely involved a civil consent decree which expired after a period of time. Judge Jackman asked Assistant Attorney General Gossens whether he claimed that Waste Management had ever been convicted of price fixing. Assistant Attorney General Gossens acknowledged that Waste Management had never been convicted of price fixing. It was also acknowledged that Waste Management never admitted any wrongdoing in the interim consent decree entered during the pendency of the civil proceeding which was ultimately dismissed by the State.

During the ensuing discussion, Judge Jackman again denied a motion for judgment of acquittal or mistrial

indicating that he would "take a verdict and see what happens." The petitioner then requested Judge Jackman to specifically advise the jury that Waste Management under its present or any other name had never been convicted of any charge involving restraint of trade and that the question asked was improper. Judge Jackman in denying the request indicated that he had already advised the jury to disregard that question and that he was "not going to say a word because I think its prejudicial anyway, prejudicial to the defendants to even mention it." The Court then indicated that it appreciated the fact that the petitioner had been put into that position due to the asking of the question. (R. 1410-1415).

That first trial resulted in a mistrial because the jury was unable to reach a verdict. The case was then assigned to Judge Maloney. The petitioner moved the trial court for the entry of an order prohibiting further prosecution due to the prosecutorial misconduct of Assistant Attorney General Gossens in the first trial. (R. 1707, 2508-2515).

Judge Maloney conducted a hearing on this issue in 1975. Assistant Attorney General Gossens testified[8] that he asked that question because it was his understanding:

> "that Mr. Standridge had testified on direct examination that when he took employment with Waste Management he investigated the philosophy of the company, and his testimony was to the effect that the philosophy of this company would never allow it to engage in price fixing." (R. 2102-2103).

The record does not support that claim. The actual testimony of Mr. Standridge in the first trial was that the philosophy of Waste Management "was that we never

[8] At the time of this testimony Mr. Gossens had left the office of the Attorney General and was in the private practice of law.

changed our price in order to get an account from a competitor." (R. 1336). Assistant Attorney General Gossens during his cross examination of Mr. Standridge in the first trial asked Mr. Standridge whether he checked "into Waste Management's background before" deciding to work for Waste Management. Mr. Standridge answered by saying he had *not* checked into Waste Management's background. (R. 1364).

Assistant Attorney General Gossens further testified in the 1975 hearings before Judge Maloney that he had seen in his files an unexecuted copy of a judgment for the Milwaukee civil case which appeared to him to enjoin Waste Management from violating the Wisconsin trade laws. He assumed without checking further that judgment had been entered in that civil case and that was the matter to which he was referring in his cross examination questions of Mr. Standridge. Mr. Gossens indicated that subsequently he discovered that no judgment had ever been entered and that there was only the entry of a temporary restraining order which expired when the civil case was dismissed. (R. 2103).

Assistant Attorney General Gossens also testified that in his judgment the testimony of his star witness, James Pellitteri in the first trial was hurt on cross examination and that he "had hoped Pellitteri would have stood up better." (R. 2116). Assistant Attorney General Gossens stated that Pellitteri "didn't come off as well as I would have liked." (R. 2117). He further indicated that Mr. Beecher in the first trial was hurt on cross examination even though he felt he was reconstructed on redirect. (R. 2117).

Judge Maloney denied the motion to dismiss on the grounds of former jeopardy due to prior prosecutorial

misconduct. Judge Maloney stated that the rule of law relied upon by the petitioner was not applicable because no mistrial was declared in the first trial due to the remarks made by Assistant Attorney General Gossens. Judge Maloney held that the constitutional rule relied upon by the petitioner was not applicable when a mistrial was declared due to a hung jury. Judge Maloney went on to state the following:

> "However, in view of the fact that this Court did allow testimony bearing upon the subject matter of the purposes of the prosecutor, I hereby make the Finding of Fact that Mr. Gossens' ***highly improper question*** was prompted not because of a fear that he had already lost the case, but out of the spirit of *overzealousness* in an attempt to counteract the testimony of Mr. Standridge that he had joined the defendant corporation because of their outstanding reputation." (Emphasis supplied). (R. 2613, Ap. 40).

The issue was presented in the post-conviction motions (R. 4106-4136, Ap. 55-67) to the trial court and presented on appeal to the Wisconsin Supreme Court. (Ap. 66). The State of Wisconsin in its brief conceded that this questions by Assistant Attorney General Gossens was not proper and that Judge Jackman sustained an objection to the question. The State of Wisconsin argued that the former jeopardy rules due to improprieties of prosecutors is not applicable unless a mistrial was declared due to the impropriety and that because the first trial before Judge Jackman terminated due to a hung jury that all questions of such improprieties disappeared. (Ap. 69). In affirming the conviction of the petitioner,

the Wisconsin Supreme Court did not discuss this issue in its opinion.[4]

One of the hotly contested issues in the first trial concerned a date when James Pellitteri and Jerry Beecher, the other unindicted co-conspirator, were supposed to have met for the first time and discussed the alleged conspiracy. The date was important because when James Pellitteri became an agent for the State in January of 1972, the State agreed that, as a matter of law, any alleged conspiracy terminated with respect to him. Counsel for Waste Management wished to explore the possibility that the meeting occurred, if at all, after James Pellitteri became a State agent and, consequently, that there was never any conspiracy involving Mr. Beecher.

Mr. Beecher testified that the meeting took place in late November of 1971. The defense moved for the production of the grand jury testimony of Mr. Beecher in the first trial to determine what he had told the grand jury about that date. Assistant Attorney General Gossens successfully resisted this motion. Prior to the second jury trial, after the hung jury, Judge Maloney ordered the production of all of the transcripts of the grand jury proceedings. It turned out that Mr. Beecher had testified under oath before the grand jury that the meeting with James Pellitteri took place in January of 1972, therefore supporting the defendant's position regarding this important event.

The prosecutors were under a general order prior to the first trial to disclose all exculpatory evidence to the defense. The prosecution team consistently stated that

[4] The briefs of both parties are referred to here and elsewhere in the Petition and printed in part in the Appendix to demonstrate that those federal issues were properly presented to the Wisconsin Supreme Court but not discussed by that Court.

they did not know of any exculpatory evidence and therefore turned none over. After the first trial resulted in a hung jury and in the hearings in 1975 before Judge Maloney, counsel for James Pellitteri, Mr. Gillman, testified that James Pellitteri told him in January of 1972 that his action in refraining from taking Waste Management's customers was motivated by a desire to protect his uncle, Phil Pellitteri, whom he believed was owed approximately $30,000 by Waste Management as a result of the buy-out agreement between Waste Management and Phil Pellitteri. The petitioner inquired why that point had not been divulged prior to the first jury trial. Assistant Attorney General Marvin Strawn advised the trial court that this had not been previously divulged because that was the first time that the State had ever heard about this claim and that the testimony was wrong. (R. 2425-2427). However, later, in compliance with the order of Judge Maloney to divulge all grand jury transcripts, the following testimony, previously suppressed, appeared in the testimony of James Pellitteri to the grand jury:

> "Q. At this time would you tell the jury why you didn't raid him? [referring to Peter Abeles, employee of the petitioner] I mean here he is, here is a guy set out in front of you waiting to be stomped on.
>
> A. They were holding back twenty-five or thirty thousand dollars from what they owed Phil for buying his business and I didn't want to jeopardize —
>
> Q. Phil is your uncle?
>
> A. My uncle.
>
> Q. *And were there any other reasons?*
>
> A. *No, that's all.*" (Emphasis supplied). (R. 2510-2511).

The petitioner moved the trial court for the entry of an order prohibiting a retrial as a result of all of the combined prosecutorial misconduct in the first jury trial. (R. 2508-2515). The trial court denied the motion; it was presented in post-conviction motions (R. 4106-4136, Ap. 55-65) and presented to the Wisconsin Supreme Court (Ap. 66) but as pointed out previously, that Court chose not to discuss the issue.

Prior to indictment, McKinley Standridge was subpoenaed to appear before the grand jury in late February, 1973. An Assistant Attorney General, Daniel Milan, was asked by counsel for Mr. Standridge whether there were any wire taps. Assistant Attorney General Milan responded by saying, "There are no Justice Department wire taps." (Ap., p. 411) Shortly after this inquiry, the grand jury excused Mr. Standridge from his subpoena. The indictment was presented on February 28, 1973.

On March 16, 1973, John Wiedow, a private investigator hired by the petitioner, went to the petitioner's offices with a radio frequency locator device. Upon entering one of the offices, the device registered the presence of an intense radio frequency signal. Mr. Wiedow adjusted the machine so that it could discriminate the intensity of this radio frequency signal. Mr. Wiedow then commenced walking around the room and noticed that the signal was more intense as he approached the telephone in that office and decreased in intensity as he moved away from the telephone in that office. Thus, the signal appeared to be radiating from the telephone. No other room showed the presence of radio frequency on March 16, 1973.

The presence of radio frequency signals was indicated on two places on this device. First of all, an indicator dial on the device showed the presence of an intense radio frequency signal. Secondly, Mr. Wiedow was wearing earphones connected to the device and the earphones produced a squealing effect similar to a feedback pattern.

Upon removing the cover of this telephone, Mr. Wiedow discovered a pair of wires connected to a terminal in the phone. The wires had nothing to do with the operation of that phone. They should have been undedicated wires. Wiedow disconnected these two "undedicated" wires. Upon disconnection, his radio frequency locator device indicated no radio frequency signals. Mr. Wiedow then placed the wires near his radio frequency locator device. Upon completion of this procedure, his device again registered the presence of intense radio frequency signals. Thus, the "undedicated" wires in the telephone were in use and were being used to create radio frequency signals. Telephones do not emit radio frequency energy. Mr. Wiedow searched the premises in an effort to find the transmitter without success. He left the wires disconnected and left the premises.

Mr. Wiedow returned to the premises on March 20, 1973. He rechecked the wires but his radio frequency locator device did not react indicating that there was at that time no source of radio frequency energy associated with the phone.

Mr. Wiedow testified at the hearings held before Judge Jackman and Judge Maloney that in his opinion there was a radio transmitter associated with the phone and that the transmitter was sending conversations from the office. He further stated on cross examination that his opinion was often checked with the designer of this ma-

chine and that the designer concurred in this conclusion. (R. 414-439, 579-580, 1805-1843).

Edward F. Sokol, a defense expert witness, testified in great detail on the operation of the radio frequency locator device. Mr. Sokol stated his professional opinion that a radio transmitter associated with the telephone in the Waste Management office was the only explanation for the radio frequency perceived by Mr. Wiedow's locator device. Mr. Sokol systematically excluded every other conceivable explanation which could have had such an effect upon the radio frequency locator device employed by Mr. Wiedow. In Mr. Sokol's professional opinion, a transmitter was associated with that telephone on March 16, 1973 and this transmitter was removed by March 20, 1973. The transmitter could have been located on or off the premises. (R. 592-658, 1988-2046).

No electronic experts refuted the testimony of Mr. Wiedow or Mr. Sokol. The State merely produced a telephone company employee, Dennis Lein, who testified that the two "undedicated" wires in the telephone should not have been tied down to any terminals and that they served no purpose in the telephone as set up by the telephone company. Mr. Lein could offer no opinion whether there was a transmitter associated with the telephone on March 16, 1973. (R. 504-558, 2273-2313).

The State denied any knowledge of or involvement in illegal electronic surveillance of the premises. This was accomplished by the filing of affidavits which in general denied any knowledge of any illegal electronic surveillance and which asserted that the only electronic surveillance known to the Department of Justice were tapes of telephone conversations prepared by James Pellitteri and turned over to the Department of Justice. According

to these affidavits, these tapes were the product of Mr. Pellitteri tape recording his own personal telephone conversations.[5] (R. 119-125, 127-129, 211-212; Ap. 45-55).

Evidentiary hearings were held before both Judge Jackman and Judge Maloney. Judge Jackman held that the petitioner had not established any State involvement in any illegal electronic surveillance. (R. 702-704).

Judge Maloney held that the petitioner had established a *prima facie* case of RF energy associated with a phone in the City Disposal office. The trial court further held that the *prima facie* case established was insufficient to place blame upon the State and that the State's denials refuted any claim that the State participated in any wrongdoing. (R. 2602-2612, Ap. 26-39). On appeal, the Wisconsin Supreme Court affirmed relying upon the decision of both judges. (81 Wis.2d 569-570; Ap. 7-9).

Prior to the original hearings before the first judge, Judge Jackman, the petitioner discovered that the State had become aware of a meeting between Mr. Standridge, the accused employee who was ultimately acquitted by the jury, and Richard Schultz, one of the competitors of Waste Management. This meeting was arranged by telephone and took place on February 7, 1973 at a luncheon spot in Madison, Wisconsin known as Nanio's. Schultz related in an interview with an investigator of the petitioner, Allen Leisten, that he was interviewed by Assistant Attorney General Paul Gossens shortly after this luncheon meeting. According to Mr. Schultz the State knew

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[5] There were occasions when Mr. Pellitteri was utilizing a transmitter supplied by the Department of Justice and where attempts were made to record these transmissions. These were employed with conversations which James Pellitteri was having with Mr. Abeles.

about this luncheon meeting at Namio's between Standridge and Schultz *prior to* his meeting with Assistant Attorney General Gossens. Mr. Schultz gave a written, sworn statement to Assistant Attorney General Gossens.

The testimentary hearings held before Judge Jackman commenced on July 3, 1973 with respect to the petitioner's motions concerning illegal electronic surveillance. One of the specific issues presented was whether the State learned about the Namio's luncheon meeting between Schultz and Standridge by employment of illegal electronic surveillance devices. The explanation of the State at that first hearing through testimony elicited by Assistant Attorney General Gossens was that the State did not have prior knowledge of the luncheon meeting at Namio's and further that the Attorney General's source of this information was Mr. Schultz himself. The testimony of Mr. Schultz as elicited by Assistant Attorney General Gossens supported the claim that the State had absolutely no knowledge of this meeting at Namio's prior to talking to Mr. Schultz. This testimony was false.

The critical testimony of Mr. Schultz was:

> "Q. [By Mr. Finerty, attorney for petitioner] All right. Well, to shorten things up, within a few days after that meeting, were you contacted by the Attorney General's office?
> A. Yes, I was.
> Q. *And when they contacted you, they knew that meeting had occurred, did they?*
> A. *Yes, sir.*
> Mr. Finerty: That's all.

Cross Examination by Assistant Attorney General Gossens

Q. Can you give me the dates of the pertinent meetings with Mr. Standridge, please.

A. I only had one meeting with him.

Q. When was that, Mr. Schultz?
A. I don't recall what date it was. I could find out, but I can't recall.

Q. *O.K., and you say the Attorney General's office knew of the meeting?*
A. *Well, I don't know if they knew of the meeting or not.* They contacted me a few days afterward.

Q. They asked you questions if you've ever had any meetings, is that correct sir?
A. Yes, sir.

Q. Not only with Mr. Standridge, is that correct?
A. Yes, sir, that's correct.

Q. *They asked you if you had had meetings with any of the garbage people of the City of Madison, is that correct?*
A. *That's correct.*

Q. *And you then informed the Attorney General's office that you had just had a meeting with Mr. Standridge, is that correct?*
A. *That's correct.*

Q. *Do you recall Mr. Gossens, myself saying to you at that time, fantastic, or something to that effect?*
A. *I don't remember exactly what was said.*

Q. Do you recall when you were called in what the purpose was, or what you were being called in for?
A. Not over the telephone, but when I got there, yes.

Q. When you were interviewed?
A. Yes.

Q. What was that?
A. There was an investigation into the price-fixing in the rubbish business.

Q. And we asked you if you had talked with any of the garbage haulers in the city of Madison, is that correct?

A. That's correct.

Mr. Gossens: Thank you, that's all.

Redirect Examination by Mr. Finerty

Q. I have one or two more questions. On June 26, last, you met with a private detective by the name of Allen Leisten, is that correct?

A. Yes.

Q. Do you know who Mr. Leisten is?

A. Yes, he's an investigator for City Disposal.

Q. And he invited you — he took a statement from you, did he not?

A. He never took a statement from me. You mean a signed statement from me?

Q. No.

A. He talked to me.

Q. *He talked to you, and you told him what happened?*

A. *Yes.*

Q. *Do you deny telling him that Ernie Smith* (an agent for the Wisconsin Department of Justice) *contacted you a few days after that meeting and told you that he knew you, Schultz, had had a meeting with Standridge and that he wanted to know what took place at that meeting?*

A. *Yes, I deny that.*" (Emphasis supplied) (R. 406-409).

Assistant Attorney General Gossens' cross examination of Mr. Leisten, the investigator for Waste Management,

further drove home the false testimony of Mr. Schultz before Judge Jackman. The critical testimony was:

"Q. [By Mr. Finerty] And during your interview with him [Mr. Schultz] on June 26, did you ask him if the Attorney General contacted him following a meeting between him and Mr. Standridge?

A. Yes, I did.

Q. What was his response?

A. His response was that he had been contacted on the telephone by Ernie Smith. He responded to a request from Smith to appear at the offices in the Loraine Hotel. Upon his arrival there he was met by Smith and subsequently was taken to or introduced to Mr. Gossens and Mr. Haag. *He was advised of his rights,* as he put it to me, and was told that an investigation was being conducted into the rubbish removal and waste haulers in the Madison area and *he was also told that they knew he had just recently been at a meeting with McKinley Standridge, and that they wanted to know what took place at the meeting.*

Mr. Finerty: Thank you, that's all.

Cross Examination by Assistant Attorney General Gossens

Q. Were you present today when Mr. Schultz testified, sir?

A. Yes, I was.

Q. Did you hear what he said?

A. Yes, sir, I did.

Q. *Was it absolutely contradictory to what you're saying now?*

A. *It certainly is.* (Emphasis supplied) (R.448-449).

The result of that phase of the 1973 hearings before Judge Jackman was that inquiry regarding the source

of knowledge of the Namio meeting was resolved in that the State's position presented by sworn testimony was that Schultz himself was the source of this information to the State. The issue simply disappeared.

Subsequent events disclosed that this testimony of Mr. Schultz was false and that Assistant Attorney General Paul Gossens knew it was false. In fact, the State knew about the Schultz-Standridge meeting at Namio's prior to interviewing Mr. Schultz in February of 1973. Mr. Schultz, in fact, was not the person who told Assistant Attorney General Gossens about this Namio's luncheon meeting. This dramatic change occurred during the first trial before Judge Jackman which resulted in the hung jury. During the cross examination of Mr. Schultz, Schultz testified that the Attorney General's office had prior knowledge of this meeting at Namio's and that personnel of the Attorney General's office had told him that their source was *James Pellitteri.* (R. 1152-1153). This testimony was elicited in the presence of Assistant Attorney General Gossens.

After the mistrial was declared due to the hung jury, and the case was reassigned, Judge Maloney ordered new hearings on certain aspects of the electronic surveillance issue. At these new hearings in 1975, Mr. Schultz testified contrary to his testimony before Judge Jackman in the 1973 hearings. He now conceded that the State knew about the meeting at Namio's before he was interviewed in February, 1973 and that he, Schultz, was *not* the source of that information. However, Mr. Schultz repudiated aspects of his trial testimony. Mr. Schultz now testified that he had been told by personnel of the Attorney General's office that their source was *Phil Pellitteri,*[6] rather than James Pellitteri. (R. 1845-1846).

Assistant Attorney General Gossens testified in May of 1975. He acknowledged that he personally knew about the Namio's luncheon meeting between Schultz and Standridge prior to his interviewing Mr. Schultz in February of 1973. According to Mr. Gossens, his source was Phil Pellitteri (R. 2057-2058) rather than either Richard Schultz or James Pellitteri. In an attempt to substantiate this claim, Assistant Attorney General Gossens read from his own memorandum of his interview with Phil Pellitteri which contained a reference to the meeting between Standridge and Schultz. The memo is dated February 16, 1973, and commences in the dictation of Assistant Attorney General Gossens with the statement "On Friday, February 16, 1973", Paul Gossens met with Phil Pellitteri. February 16, 1973 was in fact a Friday. Judge Maloney denied a defense request to look at the original memorandum. (R. 2059-2062).

On further examination, Assistant Attorney General Gossens also testified that he personally interviewed Mr. Schultz in 1973. The sworn statement of Mr. Schultz was produced for Assistant Attorney General Gossens' examination. Assistant Attorney General Gossens identified his signature and acknowledged that he was the notary public for that statement. The Schultz statement was dated by Mr. Gossens on February 15, 1973, the day before Gossens' memorandum showed that he met with Phil Pellitteri. (R. 2066-2067).

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[6] Phil Pellitteri is an uncle of James Pellitteri who owned a waste hauling company in the Madison, Wisconsin area which had been purchased by Waste Management in the fall of 1971.

The question involving the knowing use of false testimony was first presented to Judge Maloney. Judge Maloney never addressed the impact of the false testimony which had been presented to Judge Jackman during the examination of Mr. Schultz by Assistant Attorney General Gossens on July 3, 1973. Instead, Judge Maloney focused upon the events in 1975 by holding:

> "The Court discounts the whole tempest in a teapot concerning the alleged February 7, 1973 meeting at Namio's between Standridge and Schultz. The testimony showed clearly *that as of May and June, 1975,* Phil and James Pellitteri, Paul Gossens, Carl Zahn and Richard Schultz were, collectively, hopelessly confused as to who told whom about the meeting when. To infer from this confusion that the Attorney General learned about the meeting via electronic surveillance would require a more breathtaking leap of logic than the Court is prepared to make." (Emphasis supplied) (R. 2610, Ap. 36).

The issue was presented to Judge Maloney in post-conviction motions (R. 4106-4136, Ap. 55-65) and presented to the Wisconsin Supreme Court. (Ap. 1-21). On appeal, the Wisconsin Supreme Court held:

> "As to the existence of further illegal electronic surveillance by the state, both trial judges found that this did not occur. While there is contradictory evidence in the records of the two evidentiary hearings, we cannot conclude the trial courts' findings of no electronic surveillance by the state to be against the clear weight and clear preponderance of the evidence." 81 Wis. 2d at 570, Ap. 9.

The Wisconsin Supreme Court at no place specifically discussed the issue concerning the use of false testimony before Judge Jackman in the 1973 hearings.

The State acknowledged the existence of tape recordings of telephone conversations of two employees of Waste Management. It was the State's position that these telephone recordings were made by James Pellitteri, the chief operating officer of a competitor of Waste Management and an unindicted co-conspirator. Throughout most of the period of his recorded phone conversations, James Pellitteri was an agent of the State. According to Mr. Pellitteri, all of the tape recordings were made by employment of recording equipment in his office all of which constituted "one-party consent" tapes, not taps, and that this was the only electronic surveillance that either Mr. Pellitteri or the State knew about. The only method employed for recording telephone conversations acknowledged was utilization of a suction cup device on Mr. Pellitteri's own phone by Mr. Pellitteri.

The petitioner commenced asking for an opportunity for examination of the original Pellitteri tapes in 1973. The State objected at all times. Judge Jackman refused to order the state to produce the original tapes for analysis. Thus, prior to the first jury trial, the petitioner was not allowed to have the original tapes examined.[7]

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[7] The importance of examination was demonstrated by the fact that the end of one of the tapes contains interruptions which are dramatically different from what is heard on any other tapes. That tape contains the following:

> "[1] 2 sec. hum, no background speech
> [2] 44 sec. period of hum and fugitive noises having a different signature than that of Event [1]. Human voice present, distributed as follows:
>
> 0:00
> 0:01 Unintelligible
> 0:01
> 0:10 "Now Marty intends the (to) part (particular), (party). They have some technical difficulty. Okay? Now just talk."

After the hung jury, the case was transferred to Judge Norris E. Maloney. Again, the petitioner moved the trial court to order the State to produce the original tapes for examination by experts. The State countered this motion with an offer to have James Pellitteri submit himself to a polygraph examination in lieu of turning over the original tapes. Judge Maloney agreed with this offer and indicated that the test would have to be conducted by a reliable polygraph examiner and that if Mr. Pellitteri failed the test that the case would be dismissed. (R. 1724). The internationally regarded John E. Reid of Chicago,

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0:22
0:30 "We can fake it. Do anything. This may make a threat to her. We don't want any part of it."
0:34 "Talk".

[3] Approximately 0.25 sec. telephone dial tone.
[4] 5.5 sec. hum and noise similar to Event [2] but no voice present.
[5] 16.5 sec. hum of new signature, unintelligible distorted voice present.
[6] 4 sec. silence.
[7] 5.5 sec. hum.
[8] 1 sec. silence.
[9] 19.5 sec. female voice passage, interruption as noted:
0:00
0:11 "All right now we'll try this telephone and see if it's any better it might be coming in clearer on this one but the other one's got all the power behind it so I don't see how it could be any different than this one. Uhm. . . (1.5 sec. speech cutout)
0:12.5
0:19 . . . try this and see if you can get this one any better because I'm I'm ah getting tired of trying to tell Phil what (short interruption) I think that. . ." (speech cut out to end of tape.)" (R. 4421).

James Pellitteri stated that the female voice (Event [9]) was his mother's voice and denied that any voices were his. Mrs. Pellitteri denied that her voice was on the tape and stated that Event [2] was James Pellitteri's voice. James Pellitteri could offer no explanation for these Events on his tape and he had no idea how this got on his tapes. (R. 1974-1975).

Illinois personally examined Mr. Pellitteri. Mr. Reid concluded that Mr. Pellitteri was not telling the truth when he denied involvement in illegal electronic surveillance. The conclusions of Mr. Reid were as follows:

> "There were significant emotional disturbances indicative of deception on this subject's polygraph records on the following listed questions:
>
> (1) Were all the tape recordings of telephone conversations with City Disposal done with a suction cup device? Answer: Yes.
>
> (2) Did you or do you know of anyone who used electronic eavesdropping devices at the Belt Line Court office of City Disposal? Answer: No.
>
> (3) To your knowledge or did you or has anyone altered or edited the conversation originally recorded on any of the 8 tapes? Answer: No.
>
> (4) At the time you entered into a Gentleman's Agreement with City Disposal was it your intention to injure or cause harm to the City Disposal Company? Answer: No.
>
> It is the opinion of the examiner, based on this subject's polygraph records, that he is not telling the truth on the above listed questions." (R. 4459).

Despite the assurances of the trial court, Judge Maloney refused to dismiss the case. The State indicated a desire to challenge Mr. Reid's conclusions and techniques. (R. 2326). Thus, the petitioner moved the trial court for an opportunity to place this evidence of the polygraph examination before the Court with testimony to allow a complete inquiry into Mr. Reid's expertise and the basis of his opinions. (R. 2360-2362) The trial judge refused to provide a date for a hearing when John Reid could be present in Madison, Wisconsin. Instead, the trial court admitted the report of Mr. Reid, and then exercising its

own "expertise" in polygraph examinations, ripped it apart in his decision by agreeing with the State that the polygraph test which the State produced was not reliable.[8] (R. 2603-2604, 2608; Ap. 28-29, 33-34).

The question concerning the statement of Judge Maloney that he would dismiss the case if James Pellitteri failed the John Reid lie detector test and further the issue concerning the refusal of the trial judge to provide the petitioner with an opportunity for a hearing to present this evidence followed by the trial court unilaterally discounting the conclusions based upon its own "expertise" was presented to the trial court in post-conviction motions. (R. 4106-4136, Ap. 55-65). The issue was then presented to the Wisconsin Supreme Court.

The Wisconsin Supreme Court in its opinion completely misstated the record by asserting that Judge Maloney had relied upon the polygraph examination of James Pellitteri in reaching his decision that there was no illegal electronic surveillance. The Court stated:

> "Jim Pellitteri also took a polygraph test to determine whether his version of the making of the tapes was true. On the basis of the two hearings and *the polygraph test,* JUDGE MALONEY found that the tapes were lawful one-party consent tapes and that the defendant proved no other electronic surveillance by the state." (Emphasis supplied) 81 Wis. 2d at 569-570, Ap. 8.

This critical factual misstatement was pointed out to the Wisconsin Supreme Court on rehearing, but the Motion for Rehearing was denied without comment.

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[8] Judge Maloney relied in part upon another hearsay report from Mr. Reid. A hearing would have shown that this was not intended by Mr. Read to detract at all from his conclusions of deception. (R. 2362).

The trial judge assigned to the case after the hung jury, Judge Maloney, ordered the State to produce all of the original tapes for examination. The equipment and tapes were transmitted to a Michael L. Hecker at Stanford University on May 30, 1975. Mr. Hecker was designated a court witness to be paid by the petitioner. A "mini-report" from Mr. Hecker was transmitted on Friday, June 20, 1975. The petitioner was directed by the trial court to be prepared for an extensive testimonial hearing by Tuesday, June 24, 1975. This report dated June 20, 1975 was a mere summary of the tests and Mr. Hecker reported that a complete, detailed report would be lengthy. Mr. Hecker further reported that the complete report would not be available on June 23, 1975. See generally for most trial positions regarding Mr. Hecker. (R. 2357-2359).

It was the opinion of counsel for the petitioner that substantial additional testing was necessary with respect to one of the tapes.[9] The trial court ordered the petitioner to decide within three days whether this additional testing would be ordered and to be prepared within 24 hours for a hearing with respect to this additional testing. The trial court would not allow the petitioner prior to any such hearing to be advised about the detailed results of the tests or the scientific methods employed.

Counsel for the petitioner also informed the trial court that he would require the entire detailed report prior to any such hearing to properly prepare for the hearing. The trial court denied this request. The petitioner also advised the trial court that it was necessary to obtain independent analysis by and consultation with defense experts

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[9] See footnote 7, *supra.*

to properly prepare for a meaningful hearing. It was estimated that this would require several weeks of work.

Counsel for the petitioner also showed that a complete report from Mr. Hecker could not be transmitted within the time constraints and that it was impossible to be prepared for any hearing due to the continued unavailability of the full report. On June 27, 1975, Mr. Hecker stated that he could complete the full report within one week and on that same date the petitioner authorized funds for this report. (R. 2442-2443). Repeated requests for an adjournment of the trial to allow hearings on these reports were denied. (R. 2478). The full report was not received until July 21, 1975, the date set for the commencement of the jury trial. No hearings were held with respect to the reports of Mr. Hecker at any time. Instead, the trial court received the written reports of Mr. Hecker and utilized them in its opinion. (R. 2602-2605, Ap. 26-31).

This denial of confrontation was objected to throughout the pre-trial proceedings (R. 2366, Ap. 65) and was again raised to the trial court in post-conviction motions. (R. 4106-4136, Ap. 55-65). The issue was presented to the Wisconsin Supreme Court (Ap. 66) and that Court, without specifically discussing the issue, held that the trial court's finding was not against the great weight and clear preponderance of the evidence. 81 Wis. 2d at 570, Ap. 9.

Throughout the pre-trial proceedings, Judge Maloney indicated that impeachment questions would not be allowed since credibility issues were for the jury.

> "The Court: *You are not going to be given a chance of cross examination for impeachment.* You will have to do that in the trial. That is where impeachment counts, at the trial.

> Mr. Friebert: The Court has to make credibility judgments in these proceedings, too, and there is a tape here in which the fugitive voice which was a fugitive voice to us has now been identified as Dorothy Pellitteri by her son, and we want to ask her about it.
>
> The Court: What do you want to ask her? You want to ask her whether or not when she testified on the trial was the first she learned of the tape was sometime in August or some other later date, and that that obviously — that tape would indicate that she was mistaken?
>
> Mr. Friebert: Well, we'd like to hear her testimony.
>
> The Court: Well, you may like it, but what effect does it have? It doesn't have any effect upon those tapes going out to California."
>
> Mr. Friebert: She may have a different story.
>
> Mr. Hirschberg: And we want to know whether or not that voice is hers and we want to know —
>
> The Court: There isn't any issue raised by the Attorney General that it isn't her voice.
>
> Mr. Friebert: But we do.
>
> Mr. Hirschberg: We do, we want to know.
>
> "The Court: *Well, I am just warning you. There will be a stringent limitation. You are not going to get an opportunity of impeachment.* That is something that has to come at the trial. I have made my ruling. I will hear you when you get her on the stand. I will hear what is going on. I will recognize it. *If it is impeachment pure and simple, it will not go any further.*" (Emphasis supplied). (R. 2126-2128).

"Q. And when in relation to that meeting did you first learn about the existence of the tape recorder?

Mr. Strawn: *Judge, could I inquire into the reasons for these questions at this time? I don't see their purpose except maybe as impeachment.*

The Court: He stated it was for the purpose of asking her if it refreshed her memory.

Mr. Strawn: *But the line of questioning, I don't see any point in it unless they are trying to impeach her.*

The Court: Is there a question pending?

(Whereupon the Reporter read back the last question asked of the witness by Mr. Hirschberg)

The Court: Her answer? Did she answer that question?

Mr. Hirschberg: No, Your Honor.

The Court: You may answer.

A. Well, I am trying to think of when it was. I think it was shortly before we met with Pete.

Q. Did you know about the existence of the tape recorder in May of 1972?

A. No, I didn't know of it that soon before we met with Pete.

Q. Did you know about the existence of the tape recorder in June of 1972?

The Court: *Now, this is impeachment purposes. I think I will call a halt to it.* If this lady is a witness during the next trial, if there is a trial, it is very proper to impeach her if you can; but you are not entitled to three or four runs at the cat." (Emphasis supplied). (R. 2158-2159).

"Mr. Hirschberg: It doesn't go to that time because it was — the time was in August and that is subsequent to the time the tape was recorded.

Mr. Strawn: That merely shows that she is mistaken about the time.

Mr. Hirschberg: The Pellitteris have been mistaken about a great deal.

The Court: *Questions of credibility are not before me at this time. You bring that out in front of the jury.*

Mr. Hirschberg: I think the Court has to make a credibility determination in deciding the motion, if you have heard the witness' testimony.

The Court: What do you mean if I have heard it?

Mr. Hirschberg: People testify in court Judge, and one of the traditional ways that Courts base their rulings and things is based in part not only upon what they say, but upon how they say it, and the credibility of the witnesses on the stand, and I think in order for you to decide this motion, you are going to have to make credibility determination as to the witnesses that appear before you.

The Court: Yes, I am sure I do. Let me read this spectrographic stuff here." (Emphasis supplied). (R. 2335-2336).

A formal Objection to Refusal to Allow Impeachment Questions was filed. (R. 2363). The issue concerning the necessity for the trial judge to allow impeaching questions in pretrial hearings involving Fourth Amendment issues was presented to the trial court on post-conviction motions (R. 4106-4136, Ap. 55-65) and to the Wisconsin Supreme Court on appeal. (Ap. 1-21). The Wisconsin Supreme Court held that "this court will not substitute its judgment for that of the trial court in matters of credibility. 81 Wis. 2d at 570, Ap. 8. No comment or discussion was made by the Wisconsin Supreme Court with respect to

whether the trial court disallowed questions which challenged credibility.

The trial court authorized at least four amendments to the indictment. Originally, the indictment charged the petitioner with violating the second sentence of §133.01, Wis. Stats., which is inapplicable to services and is a section which does not track the Sherman Act. The original indictment of the grand jury charged the petitioner with:

> Commencing *in the year 1970,* the exact date being unknown to the Grand Jury, and continuing thereafter until at least February, 1973, in the County of Dane and State of Wisconsin, the defendants and co-conspirators named herein did feloniously engage in an unlawful combination and conspiracy *intended* to restrain *competition in the supply or price of an article or commodity which is the subject of* trade or commerce in this State." (Emphasis supplied showing deletions and changes). (R. 4).

The indictment was formally amended four times before trial on motion of the State. The case was never represented to a grand jury. Finally, the charging paragraph became:

> "Commencing in November, 1971, the exact date being unknown to the Grand Jury, and continuing thereafter until at least February, 1973, in the County of Dane, and State of Wisconsin, the defendants and co-conspirators named herein did feloniously engage in an unlawful combination and conspiracy to restrain trade or commerce in this state." (R. 2717-2718).

The grand jury also charged in Paragraph 20 of the indictment that the conspirators affected or attempted to affect the waste removal bids or quotes for 49 separate business entities. (R. 107-108). The petitioner put in

substantial proof that no bids or quotes were affected as a result of this alleged agreement. In fact, this was a major basis for the defense. However, the trial court in instructing the jury deleted all references to effects upon commerce. (R. 3828). The trial court charged the jury that the crime contained in the indictment was committed once an agreement was reached even though there were no effects upon commerce and even though there were no overt acts. The jury was told: "It is not necessary that the conspiracy achieve its object or be successful." (R. 3834).

The petitioner objected to every formal amendment to the indictment and objected to the instruction whereby Paragraph 20 of the indictment was deleted from the indictment. The issue was again presented on post-conviction motions and presented to the Wisconsin Supreme Court. The Wisconsin Supreme Court held that the formal amendments to the indictment were matters of form rather than substance and in no way prejudiced any rights of the petitioner. 81 Wis.2d 566-567, Ap. 4-5.

With respect to the instruction to the jury which removed Paragraph 20 from the indictment, the Wisconsin Supreme Court said that Wisconsin law followed decisions of the United States Supreme Court on the Sherman Act and that effects upon commerce need not be proven since the gist of the crime was a mere conspiracy or an agreement. 81 Wis.2d 574, Ap. 12-13. The Wisconsin Supreme Court did not specifically discuss whether the deletion of Paragraph 20 from the indictment was permissible.

Over objection, the trial court also instructed the jury:

> "When there are no circumstances to prevent or rebut the presumption, the law presumes that a rea-

sonable person intends all of the natural, probable and reasonable consequences of his deliberate acts." (R. 3692-3693).

The issue was properly presented to the Wisconsin Supreme Court. The Wisconsin Supreme Court held:

> "The defendant's objection to the instruction that a person is presumed to intend the natural consequences of his deliberate acts is without merit in Wisconsin." 81 Wis. 2d 582, Ap. 21.

Petitioner also offered the following instruction:

> "The essence of the offense of conspiracy is that there must be an agreement between the parties. I have previously instructed you that the object of the conspiracy need not be achieved. The defense has introduced evidence which demonstrates a course of conduct of all parties both before, during and after the alleged conspiracy. If you find that there was no substantial change in the course of conduct throughout this period of time, you may infer, but you need not do so, that there was never an agreement between the parties as alleged in the indictment. Evidence of competition between the alleged conspirators creates an inference that there never was a conspiracy. It is for you, the jury, to determine the strength of the inference and the weight which you want to give it." (R. 4015).

The trial court refused to give this instruction. The issue was properly presented to the Wisconsin Supreme Court. The Wisconsin Supreme Court held:

> "Because we have held in this opinion that in proving price fixing, bid rigging and market allocation the state was not required to prove an actual injury to competition, we uphold the trial court's refusal to instruct the jury that evidence of competition between co-conspirators creates an inference that no conspiracy existed." 81 Wis. 2d at 582, Ap. 21.

The trial court instructed the jury upon agreement *prior to* closing argument. One of the instructions given which is a fairly standard one throughout the country was as follows:

> "The witnesses, Pellitteri and Beecher, have testified on behalf of the State, and if their testimony is true, they participated in the crime charged against the defendants and are accomplices therein. You are instructed that the evidence of an accomplice is competent evidence in a criminal case upon which to base a verdict of guilty, provided it is of such character taken in connection with all the other evidence in the case as to satisfy you of the guilt of the defendants in such case beyond a reasonable doubt; but ordinarily it is unsafe to convict upon the uncorroborated testimony of any accomplice. Corroborating evidence is any credible evidence given by any witness who is not an accomplice, or documentation from any source other than an accomplice. * * * " (R. 3843-3844).

During the closing argument of counsel for the petitioner the following occurred:

> "Now Pellitteri and Beecher were accomplices in this case, and the Judge has read you a lengthy instruction about the law with respect to accomplice testimony. These instructions, by the way, were not developed over night or during the course of this trial. They have been developed over the centuries of American and English and beyond Biblical jurisprudence of the history of mankind. These things don't spring up within the middle of a trial. They are based upon the experience of mankind, and here is what the Judge said to you about accomplice testimony, and it is extremely important to the defense and I will read the whole thing to you."
> [Instruction read]
>
> * * *

And we have Ernie Smith who may be big, but I don't think it is funny, all around this case, he is hiding in Jim Pellitteri's mother's house. On June 13 he gets there, Ernie Smith from the defendant, from Pellitteri, but this one he doesn't get until February of 1973 [referring to slips of paper in evidence allegedly containing bids obtained from Mr. Abeles] and it is Jim's testimony that he got this in May of 1972, but where did he get it? He has seen Peter Abeles lots of places, lots of places.

It doesn't take very much for a person who will willingly lie and cheerfully lie in the name of his lawyer or the name of the State. It doesn't take very much, and the Judge's — as I have already pointed out, because he is an accomplice — I have read this in full to you: The Judge says "corroborating evidence is any credible evidence given by any witness who is not an accomplice, or documentation from any source other than an accomplice."

This is not corroborating evidence.

The source is Jim. The liar. The cheat. The fraud. The play actor.

Mr. Strawn: *Judge, I object. He was not an accomplice at that time or working for the State.*

The Court: *That was May of '72, was it not?*

Mr. Strawn: *Yes, it was. He was not an accomplice after January of 1972.*

The Court: *The jury will understand that, that after January 15th of '72 he was not an accomplice, not in the conspiracy.*

Mr. Friebert: The ex-accomplice, now undercover agent, prevaricator of lies in the name of his undercover work. There is no corroboration for this. There is no Ernie Smith saying on this stand in this case to testify about that or other agents of the State.

There are no handwriting experts. There is no fingerprint analysis. There is no individual evidence on that. It is Jim —

Mr. Strawn: Judge, I object to that, and I think we need a conference on that last series of statements. I want an instruction on that.

Mr. Friebert: There was evidence in this case.

Mr. Strawn: *You know very well why we couldn't get evidence on that.*

Mr. Friebert: I move for a mistrial.

Mr. Hirschberg: [Counsel for Mr. Standridge] I join. I move for Judgment.

The Court: You are moving for Judgment?

Mr. Hirschberg: Judgment and mistrial.

Mr. Friebert: Yes.

The Court: Motion denied. Motion for mistrial is denied. Proceed. (R. 3883-3901).

Outside the presence of the jury, counsel for the State indicated that he had interrupted argument because it was his position that he was unable to get fingerprints or handwriting exemplars of Peter Abeles because he was resisting extradition. The petitioner pointed out that handwriting exemplars were available if the State had subpoenaed these items and that Abeles' fingerprints were also available if the State had thought about this matter prior to closing argument. Judge Maloney agreed that fingerprints and handwriting exemplars were available to the State prior to the trial. The petitioner offered several instructions. The first was:

"Mr. Strawn's objection to Mr. Friebert's closing argument concerned the difficulty of obtaining handwriting exemplars and fingerprints of Mr. Abeles.

Mr. Abeles had been arrested and his fingerprints have been available to the State since March of 1973. During the grand jury investigation the State could have sought handwriting exemplars from the files of City Disposal by subpoena, but such records were never sought by the State." (R. 3908).

This instruction was rejected by the Court. The petitioner then made another request for an instruction:

"Mr. Friebert: And that left the implication that there was evidence out there that has not been admitted, and that is my concern about this. I would like to have some kind of an instruction to take that away since his objection concerns handwriting exemplars and fingerprints.

The Court: He didn't get the handwriting/fingerprints in front of the jury, did he? That was afterwards.

(Discussion off the record. Court reporter reads back notes of objection made in open court during Mr. Friebert's final argument.)

The Court: You made a move for mistrial, and I denied that, so let's go ahead.

Mr. Friebert: Then I'd like to have an alternate instruction that Mr. Strawn was referring to fingerprints and handwriting exemplars in his objection.

The Court: At that time he hadn't referred to it.

Mr. Friebert: And I had referred to a lot of things just before that, and I think that it should be made clear to the jury that that is what Mr. Strawn was referring to." (R. 3909-3910).

The Court refused to give any instruction. The Court merely stated to the jury that Mr. Strawn had withdrawn his request for an instruction. (R. 3913).

These events produced several issues which were presented in the post-conviction motions and to the Wisconsin Supreme Court. The first issue concerned the fact that the first interruption effectively modified the standard jury instruction limiting the jury's consideration of a lack of corroboration to those times when an accomplice was actually an accomplice, even though the standard Wisconsin instruction does not contain any time limitations. On this issue, the Wisconsin Supreme Court held:

"The court gave an instruction involving the weight to be given the testimony of an accomplice. The defendant did not request a similar instruction involving the weight to be given the testimony of an informer. During closing arguments the trial judge told the jury that the witness Pellitteri was no longer an accomplice after January 15, 1972, the date he became an informer. The defendant contends that this statement may have led the jury to believe it could give greater weight to Pellitteri's testimony after January 15 than before. Since both parties agreed at the time of trial that Pellitteri was no longer a coconspirator after January 15, 1972, we hold that the defendant has waived any claim of error concerning the effects of the court's instructions by not requesting an informer instruction." 81 Wis. 2d at 581, Ap. 20.

The second interruption concerns a statement made by Assistant Attorney General Strawn which indicated the existence of evidence which could not be introduced to the jury or that counsel for the petitioner was somehow responsible either for preventing the discovery of evidence or for deceiving the jury in his argument. The issue was presented on post-conviction motions and was presented to the Wisconsin Supreme Court. The Wisconsin Supreme Court held:

"During the defendant's closing argument counsel referred to the lack of corroborative evidence re-

garding two pieces of paper on which, Pellitteri testified, one of the defendant's agents Abeles had written some quotations for bids. The prosecutor objected to this argument stating that, 'You know very well why we couldn't get evidence on that.' The record shows that at the time of trial Abeles was outside the jurisdiction of the court and was challenging extradition from Illinois, but that the jury was not told of this fact. The defendant moved for a mistrial on the grounds that the prosecutor erred in testifying about matters not in the record. *The trial court struck the prosecutor's remark,* but refused to grant a mistrial. We hold that the trial judge did not abuse his discretion in concluding that the defendant was not denied a fair trial by reason of his remark." (Emphasis supplied) 81 Wis. 2d at 580-581, Ap. 20.

On Motion for Rehearing to the Wisconsin Supreme Court, it was pointed out that the opinion contained a misstatement of a material fact in that the record clearly showed that Judge Maloney did not strike the remarks of the prosecutor. The Wisconsin Supreme Court denied the motion for rehearing without comment.

In the proceedings before the grand jury, Assistant Attorney General Paul Gossens was apparently aware that McKinley Standridge, an employee of the petitioner, had stated to James Pellitteri that it would be illegal to fix prices and that he would not do that. This exculpatory evidence was not presented to the grand jury.

The trial courts held that a prosecutor is not obligated to present exculpatory evidence to a grand jury. (R. 2600, Ap. 26). The issue was properly presented on appeal to the Wisconsin Supreme Court. The Wisconsin Supreme Court held:

"The defendant claims the prosecutor was constitutionally obligated to elicit testimony [before the grand jury] concerning an exculpatory colloquy between witness Pellitteri and the defendant's general manager Standridge that is on the tapes. The contents of the tapes are not admissible under *Arnold,*[10] and the information they contained was made available to defendants at their request before trial. That is all that was here required." 81 Wis. 2d at 579, Ap. 18.

Thus, the Wisconsin Supreme Court denied the petitioner's position that a prosecutor has a constitutional duty to present exculpatory evidence to a grand jury for its consideration.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. RECENT DECISIONS OF THIS COURT REGARDING FORMER JEOPARDY ANNOUNCED AFTER THE DECISION OF THE WISCONSIN SUPREME COURT MAKE THE DECISION OF THE TRIAL COURT AND THE WISCONSIN SUPREME COURT IN CONFLICT WITH DECISIONS OF THIS COURT.

In *Sanabria v. United States,* — U.S. — (1978), the Court restated those occasions when the prohibition against double jeopardy prevents reprosecution of a defendant when there has been misconduct in a trial. Absent "prosecutorial or judicial overreaching . . . . retrials after prosecution is terminated by a defendant's request for a mistrial [are permitted]." At footnote 15, the Court again stated the constitutional parameters to be that "a

[10] *State ex rel. Arnold v. County Court,* 51 Wis. 2d 434, 187 N.W. 2d 354 (1971).

new trial is permitted . . . . where the defendant requests a mistrial in the absence of *prosecutorial or judicial overreaching, United States v. Dintiz,* 424 U.S. 600 (1976)." (Emphasis supplied).

This case presents a question of clear prosecutorial overreaching in the first trial. As shown in the statement of the case,[11] Assistant Attorney General Gossens on cross examination of Mr. Standridge completely and unwarrantedly smeared the petitioner before the jury. By his questioning, he effectively stated to the jury that Waste Management had been convicted of price fixing in the past. Not only would such questions have been wholly improper even if true, but Waste Management has never been convicted of price fixing. In this case, the smear involved a complete and reckless disregard for the truth and is without any legal justification.

In his testimony in 1975 before Judge Maloney, Assistant Attorney General Gossens stated that his purpose in asking the prohibited question was to counteract Mr. Standridge's testimony to the effect that Mr. Standridge had investigated Waste Management and knew that its philosophy did not allow price fixing.[12] Judge Maloney in ruling against the petitioner indicated that the question asked was "highly improper" and was caused by "overzealousness" occasioned by Mr. Gossens' desire to counteract the testimony of Mr. Standridge. However, the record refutes Assistant Attorney General Gossens' assertions and the finding by Judge Maloney. All Mr. Standridge stated on direct examination was that he was told that it was the philosophy of Waste Management never to cut back on prices to meet competition. On Assistant Attorney

[11] See Statement of the Case, pp. 11-18 for factual background.

[12] This reason was never advanced to Judge Jackman in 1973.

General Gossens' cross examination, Mr. Standridge denied that he had done any checking into the background of Waste Management. Thus, even within the framework of the stated reasons for asking the completely prohibited questions, there was no justification.

The type of conduct employed by Assistant Attorney General Gossens was condemned by Chief Justice Burger in *United States v. Dinitz,* 424 U.S. 600 (1976), where he stated in a concurring opinion:

> "To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." *Id.* at 612.

The Chief Justice was referring to a defense attorney in *Dinitz.* That opinion is even more applicable to an Assistant Attorney General who uses the prestige and power of his office to make a false statement to a jury calculated to smear one of the defendants and to assist the State in obtaining a favorable result.

The trial court held in part that the federal jeopardy issues were inapplicable here even though there was prosecutorial misconduct because the mistrial was not declared due to the misconduct. The incident occurred near the end of the trial. Judge Jackman in denying a motion for a mistrial stated that he would "take a verdict and see what happens." It is possible that Judge Jackman believed that there could be an acquittal which would moot all issues. Instead, there was a hung jury and a mistrial declared due to that fact. The Wisconsin Supreme Court did not discuss this issue although it was presented on appeal.

There are several reasons why the issue might not have been discussed by the Wisconsin Supreme Court. First of all, the Wisconsin Supreme Court might have agreed with the trial court and the State that the issue disappeared because the mistrial in the first case resulted from a hung jury rather than a declaration of a mistrial by the trial judge due to the misconduct. If so, this presents a significant question for the United States Supreme Court. The petitioner believes that the double jeopardy clause protects defendants from prosecutorial overreaching under any circumstances. The objectives of the prosecutor were obtained with any result other than acquittal.

A second reason why the Wisconsin Supreme Court may not have discussed this issue is because Wisconsin courts do not employ the correct standard to determine this question. In *State v. Calhoun,* 67 Wis. 2d 204, 226 N.W. 2d 504 (1975), the Wisconsin Supreme Court stated the federal position to be that a second trial cannot be held if prosecutorial misconduct was based upon "a fear that the jury was likely to acquit the accused." *Id.* at 223, quoting from *United States v. Tateo,* 377 U.S. 463, 468 (1964), referring to *Gori v. United States,* 367 U.S. 364 (1961).

Assistant Attorney General Gossens had testified that even though certain aspects of the prosecution had not gone well in the first trial he was still not fearful of losing a conviction.[13] Judge Maloney in his opinion stated that

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[13] In this context, Assistant Attorney General Gossens testified that his star witness, James Pellitteri, had not testified well in the first trial. Furthermore, the cross examination of another principal witness, Gerald Beecher, was severely undercut according to Mr. Gossens by the cross examination in the first trial.

fear of acquittal was not the reason for the "highly improper question" but rather the question was motivated to respond to testimony which Assistant Attorney General Gossen thought had been given by Mr. Standridge. The Wisconsin Supreme Court did not discuss this issue due to its adherence to its *Calhoun* standard which is in conflict with decisions of this Court.

It is clear from the recent decision of the Court in *Sanabria* quoting from *Dinitz* that the test is not whether the prosecution feared an acquittal but whether the actions of the prosecutor constituted "prosecutorial overreaching." Consequently, the writ sought should be granted because the case presents an issue of substantial importance concerning the appropriate standard of misconduct for implementation of the jeopardy bar to retrial.

Finally, although this Court has held that prosecutorial overreaching would bar a subsequent trial of a defendant, the Court has not discussed what constitutes that kind of overreaching which would prevent a second trial. The trial court in this case, Judge Maloney, clearly held that the question which falsely smeared the petitioner in the first trial was "highly improper" and the result of "overzealousness" on the part of Assistant Attorney General Gossens. Assistant Attorney General Gossens also relied upon a misstatement of the record to justify his smear tactics. Mr. Standridge never made the petitioner's reputation an issue. The intentional smear which falsely stated to the jury that the petitioner had been previously involved in or convicted of price fixing is inexcusable. The highly prejudicial nature of such a smear cannot be denied. The Court held in *Boyd v. United States,* 142 U.S. 450 (1892) that:

> "Proof of [other crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue." *Id.* at 458.

Chief Justice Warren, concurring in *Spencer v. Texas,* 385 U.S. 554 (1967) discussed *Boyd* in the context of violations of the due process clause of the Fourteenth Amendment.

> "While this court has never held that the use of prior convictions to show nothing more than disposition to commit crime would violate the due process clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the due process clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.' Krulewitch v. United States, 336 U.S. 440, 453 (1949). (Concurring Opinion)" *Id.* at 572-575.

Finally, the Court held in *Burgett v. Texas,* 389 U.S. 109 (1969) that:

> "The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error harmless beyond a reasonable doubt." *Id.* at 115.

This has also been the clear law of Wisconsin. The Wisconsin Supreme Court said in *Barton v. Bruley,* 119 Wis. 326, 96 N.W. 815 (1903):

> "[N]o irrelevant fact is more likely to have weight with the ordinary jury than that the accused has done similar acts on other occasions." *Id.* at 330.

Thus, the first trial[14] of the petitioner was obviously so infected by the prosecutor that any conviction would as a matter of law have been overturned by either a trial or an appellate court. Every prosecutor in Wisconsin knows that that question was improper and that the chances of reversal of any conviction obtained was high. The fact that the basis of the question was a pure fabrication on the part of Assistant Attorney General Gossens in that the petitioner has never previously been convicted of any violations of the anti-trust laws clearly shows that the actions constituted deliberate overreaching.

This case then presents a clear case of prosecutorial overreaching. The Court can decide whether former jeopardy considerations are applicable where a first trial resulted in a mistrial due to a hung jury and where the first trial was contaminated with prosecutorial overreaching involving falsely telling a jury that the petitioner had engaged previously in the very conduct charged in this case. The Wisconsin trial court clearly applied an incorrect federal standard which was not corrected by the Wisconsin Supreme Court. The recent former jeopardy decisions of this Court make these issues extremely

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[14] The weakness of the State's case is demonstrated by the fact that despite this highly prejudicial inquiry, the jury in the first trial was unable to reach a verdict.

important because they will be increasingly faced by lower courts throughout the country.[15]

II. RECENTLY THIS COURT HELD THAT A HEARING MUST BE HELD IN A FOURTH AMENDMENT CONTEXT WHEN THERE IS A SHOWING OF FALSITY IN AN AFFIDAVIT FOR A WARRANT; THIS CASE PRESENTS THE KNOWING USE OF FALSE TESTIMONY IN A FOURTH AMENDMENT SUPPRESSION HEARING.

In *Franks v. Delaware,* — U.S. — (1978), this Court held that the constitutional right to be secure against unreasonable searches and seizures prohibited law enforcement officers either to knowingly use false evidence to obtain a search warrant or to engage in a reckless disregard of truth in obtaining a search warrant. Under either of those circumstances, the Court held that a search warrant could be challenged.

Assistant Attorney General Gossens in the context of a Fourth Amendment inquiry into whether illegal electronic surveillance was utilized either knowingly employed false testimony or engaged in a clear reckless disregard of the truth to obtain a favorable ruling.[16] In

[15] The Statement of the Case also shows that the first trial was infected with two other clear instances of prosecutorial overreaching. The first involved the failure to disclose exculpatory evidence which was contained in the testimony which had been presented to the grand jury by the State's principal witness, James Pellitteri, to the effect that he had not taken customers of the petitioner because of his desire not to hurt his uncle's ability to collect money owed to his uncle by the petitioner. The second event was the failure of the prosecution to disclose to the defense that Mr. Beecher, another principal witness against the petitioner, had testified under oath differently before the grand jury with respect to a critical date concerning his alleged entrance into a conspiracy.

[16] See Statement of the Case, pp. 18-28 for factual background.

1973 when this case was assigned to Judge Jackman, and shortly after the indictment was presented, an investigator for the petitioner interviewed Mr. Richard Schultz, a competitor. Mr. Schultz stated that he had been called into the office of the Attorney General shortly before the indictment was presented. Mr. Schultz also stated to the investigator that he was also told there that the Attorney General's office knew about the luncheon meeting with Mr. Standridge at Namio's.

Later, on July 3, 1973, in the context of a hearing to determine whether the State or any of its agents or persons acting under their direction and control had employed illegal electronic surveillance "bugging" devices on the premises of the petitioner, one of the questions became: *How did the State learn about that meeting between Standridge and Schultz?* The State's false explanation in 1973 was that Mr. Schultz had told Assistant Attorney General Gossens about this meeting. Mr. Schultz also denied the truth of the statements attributed to him by the petitioner's investigator. All this testimony was in the presence of Assistant Attorney General Gossens on July 3, 1973 and most of it was promulgated by him. That sworn testimony ended this inquiry and Judge Jackman ultimately held that the petitioner had failed to prove any illegal electronic surveillance by the State or any of its agents.

Judge Jackman's ruling was relied upon in part by Judge Maloney, the second trial judge in this case who presided after the hung jury. Judge Jackman's decision was also specifically relied upon by the Wisconsin Supreme Court. The issue concerning the deliberate and knowing use of false testimony at the July 3, 1973 hearings before Judge Jackman has never been discussed by

any court. The matter was not presented to Judge Jackman because the falsity was not discovered until the middle of the first trial. Judge Maloney only discussed the obvious misleading and inaccurate testimony which he witnessed in 1975.[17] The Wisconsin Supreme Court merely stated that there was confusion in the testimony but never specifically discussed this question of the knowing use of false testimony.

If a hearing is required to determine the validity of statements made in an affidavit in support of a search warrant according to *Franks,* then a hearing is surely required to determine whether false testimony had been elicted deliberately to thwart a Fourth Amendment inquiry involving wiretapping. A hearing cannot be limited to the mere taking of testimony. A hearing must require as a matter of due process fundamental fairness that courts squarely face the questions and articulate decisions. The Court in *Stone v. Powell,* 428 U.S. 465, 494 fn. 36 (1976) cites *Townsend v. Sain,* 372 U.S. 293 (1963) with respect to the standards to be applied to determine whether there has been "full and fair litigation of a Fourth Amendment claim. . . ." *Townsend* has as its basic underpinning that trial judges must articulate findings of fact which findings are supported by the record on Fourth Amendment claims. Cf. *Kent v. United States,* 383 U.S. 541, 554 (1966); *Morrissey v. Brewer,* 408

[17] Mr. Schultz first testified that he was told by the State that the source of information was James Pellitteri. Mr. Schultz then testified that the State told him that the source was Phil Pellitteri. Assistant Attorney General Gossens ultimately admitted prior knowledge and testified that his source was Phil Pellitteri, but he produced a memorandum which refuted that source because the memorandum disclosed that the conversation with Phil Pellitteri took place the day *after* Assistant Attorney General Gossens obtained a statement from Mr. Schultz. The petitioner was not allowed to look at this document.

U.S. 471, 489 (1972); *Specht v. Patterson,* 386 U.S. 605, 610 (1967).

There can be no doubt that deliberate false testimony was elicited before Judge Jackman on July 3, 1973 because the State changed its story on a critically important fact.[18] The impact in this setting of this deliberate use of false testimony in 1973 is an important issue. However, Judge Maloney and the Wisconsin Supreme Court refused to clearly and squarely discuss these issues.[19]

There can be no doubt that the knowing use of false testimony violates the Fourteenth Amendment rights to due process and equal protection of the laws. *Miller v. Pate,* 386 U.S. 1 (1967).

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney v. Holohan, 294 U.S. 103. There has been no deviation from that established principle. Napue v. Illinois, 360 U.S. 264; Pyle v. Kansas, 317 U.S. 213; cf. Alcorta v. Texas, 355 U.S. 28. There can be no retreat from that principle." *Id.* at 7. [parallel cites omitted].

In *Miller,* the prosecution represented in a rape-murder case that reddish stains were blood when the stains were in fact paint. In this case, in 1973, the prosecution rep-

[18] *Franks v. Delaware,* — U.S. — (1978) employs a lesser standard to challenge an affidavit in support of a warrant — reckless disregard of truth. If this *new* standard is applicable to suppression hearings involving electronic surveillance, it too was violated.

[19] Judge Maloney called the entire issue a "tempest in a teapot" and then discussed the confusing testimony in 1975 without ever focusing on the false testimony elicited in 1973 before Judge Jackman. The Wisconsin Supreme Court said that they were not "a performing bear", 81 Wis. 2d at 564, Ap. 2, and employed that phrase as precedence to refuse to discuss this event of clear prosecutorial misconduct other than to generally note differences in testimony.

resented in a hearing on illegal electronic surveillance that Mr. Schultz was their source of knowledge about a meeting between Mr. Schultz and Mr. Standridge when in fact he was not their source. Since Assistant Attorney General Gossens personally participated in the meeting with Mr. Schultz, he was a person who knowingly elicited this false testimony. At a minimum, the recent standard as enunciated by the Court in *Franks* is applicable. The testimony elicited clearly evinced a reckless disregard of truth.

The Court has never determined the effect of false testimony elicited in the context of either a general inquiry involving the Fourth Amendment or specifically involving a hearing to determine whether there had been illegal electronic surveillance. On that basis, the issue is of major nationwide significance. The question presented is similar to *Franks* but concerns the impact of false testimony in a hearing concerning alleged direct violations of the Fourth Amendment to the United States Constitution rather than false assertions contained in an affidavit to support a warrant.

The petitioner contends that an appropriate constitutional result is to invoke the general rule of evidence that a presumption is created when one has evidence in his possession and does not produce it, that the suppressed evidence would be unfavorable to the defaulting party. See Wigmore on Evidence, 3rd Edition, Vol. 2, §285; *Graves v. United States,* 150 U.S. 118, 121 (1893); *United States v. Young,* 463 F.2d 934 (D.C. Cir. 1972); cf. *Caminetti v. United States,* 242 U.S. 470, 495 (1917). In this case, the only unfavorable presumption in the context of the purpose of the hearing is that knowledge about the meeting between Mr. Schultz and Mr. Standridge was obtained by employment of illegal electronic surveillance devices.

As with other presumptions, assuming such a presumption is rebuttable, the burden of persuasion then shifts to the State. In this case, the confusing and conflicting stories presented in 1975 as a matter of law cannot rebut the presumption. Judge Maloney found the 1975 testimony to be "hopelessly confused." In other words, the State was completely unable to prove a legal source for this information. This finding is important to demonstrate that a presumption of impropriety created by the 1973 false testimony has not been rebutted.

The issue presented is of major national significance. The Court has now resolved the impact of the knowing use of false testimony or a reckless disregard of truth when affidavits for warrants are involved. This case involves knowing use of false testimony or a reckless disregard of truth when a hearing is conducted concerning the existence of illegal electronic surveillance. This Court has not discussed this question to date.

III. THE DECISION OF THE WISCONSIN SUPREME COURT IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT AND, IN PARTICULAR, THE RECENT DECISION OF *UNITED STATES v. UNITED STATES GYPSUM CO.*,— U.S. — (1978).

In *United States v. United States Gypsum Co.,* — U.S. — (1978), the Court held that it was improper to instruct a jury in a criminal case that there was a presumption of intent. The petitioner objected in the trial court to instructing the jury with the Wisconsin standard

instruction which presumes a defendant intends the natural and probable consequences of his deliberate acts. The trial court gave the standard Wisconsin instruction and the Wisconsin Supreme Court stated that that standard instruction was appropriate in Wisconsin.[20] Recently, this instruction was declared unconstitutional. *Hughes v. Matthews,* — F.2d — (7th Cir. 1978).

The recent decision of the Court in *United States Gypsum Co.* repudiates that position. Furthermore the decision of the United States Supreme Court in *Mullaney v. Wilbur,* 421 U.S. 684 (1975) states that it is improper to instruct a jury to presume any elements of a criminal offense and thereby to shift the burden of proof to the defendant to overcome the presumption.

United States Gypsum Co. also demonstrates two other errors by the Wisconsin Supreme Court.[21] The indictment in this case charged at Paragraph 20 that the alleged conspiracy "attempted to affect or did affect . . . bids or quotes" with respect to a list of 49 enumerated customers in the Madison, Wisconsin area. A substantial portion of the trial was consumed by the petitioner refuting any claimed impact upon commerce. The petitioner was attempting to prove that while there might have been some exchange of price information on some accounts, the fact is that this exchange in no way affected commerce and was therefore not intended to affect commerce.

This was a major part of the defense of the petitioner. However, the trial court instructed the jury, over objection, that the State did not have to prove any effect

[20] See Statement of the Case, pp. 39-40 for factual background.

[21] See Statement of the Case, pp. 38-39, 40 for factual background.

upon commerce. The petitioner then offered an instruction:

> "The essence of the offense of conspiracy is that there must be an agreement between the parties. I have previously instructed you that the object of the conspiracy need not be achieved. The defense has introduced evidence which demonstrates a course of conduct of all parties both before, during and after the alleged conspiracy. If you find that there was no substantial change in the course of conduct throughout this period of time, you may infer, but you need not do so, that there was never an agreement between the parties as alleged in the indictment. *Evidence of competition between the alleged conspirators creates an inference that there never was a conspiracy.* It is for you, the jury, to determine the strength of the inference and the weight which you want to give it." (Emphasis supplied).

The trial court refused to give this requested instruction. These two actions of the trial court were affirmed by the Wisconsin Supreme Court. As a matter of law, the Wisconsin Supreme Court held that Wisconsin law followed decisions of this Court involving the Sherman Act. Thus, according to the Wisconsin Supreme Court, the refusal to give this instruction was proper and effectively deleting paragraph 20 from the indictment was also proper because the State did not have to prove any effect upon commerce under the Sherman Act.

Both of these actions were condemned by this Court in *United States Gypsum Co.* In *United States Gypsum Co.,* the Court noted at footnote 20 that two different types of intent are required in a conspiracy. They are "the basic intent to agree, which is necessary to establish the existence of the conspiracy, and *the more traditional intent to effectuate the object of the conspiracy.*" (Em-

phasis supplied). The refusal to give the proposed instruction coupled with the instructions on the presumption of intent and that the State need not prove an effect on commerce effectively took away from the jury the question of whether the petitioner intended to effectuate the object of the conspiracy.[22]

The instructions also violated another holding of *United States Gypsum Co.* The Court held that a conspirator could withdraw by commencing to compete with other conspirators. The jury instruction proposed by the petitioner but rejected by the trial court and the Wisconsin Supreme Court would have advised the jury that evidence of competition was competent evidence to show that there never was a conspiracy in the first place.[23] Such an instruction would have served an identical purpose to the one which this Court held required in *United States Gypsum Co.* There the issue was whether there was a withdrawal from a conspiracy. Here the issue was whether there was entry into a conspiracy in the first place. Evidence of vigorous competition is equally significant to both questions.

The trial court and the Wisconsin Supreme Court held that there was no error in amending the indictment by instructing the jury that the State need not prove any effect upon commerce whatsoever even though an effect upon commerce was alleged by the grand jury.

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[22] The petitioner was allowed to argue that there was no conspiracy because there was no effect upon commerce. However, the Court also held in *United States Gypsum Co.* that the right to argue is no substitute for proper instructions.

[23] The petitioner proved that the so-called co-conspirators obtained price information from the petitioner and then went out and armed with the information undercut or attempted to undercut the petitioner to take away business.

The reasoning of the Wisconsin Supreme Court was that all the State need prove was an agreement when a violation of Wisconsin's "little" Sherman Act is involved.

United States Gypsum Co. demonstrates that in cases involving an exchange of price information an effect upon commerce is probably necessary to establish a violation of the Sherman Act because such actions might not constitute a *per se* violation. The Court stated at footnote 16:

> "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more rather than less competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act."

In the body of the opinion related to that footnote the Court stated:

> "With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive effects, see, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case — the exchange of price information among competitors — is illustrative in this regard."

The petitioner's defense was that its prices were never a closed book and that dissemination of this information did not in fact affect commerce. It was certainly reasonable for the Madison grand jury in its charge to require the State to prove an effect upon commerce in this case.

Since it was reasonable for the grand jury to make that a part of the charge, the petitioner had a right to rely upon the charge as requiring the State to prove an effect upon commerce.

The petitioner spent a substantial amount of time during the course of the trial to demonstrate that there was fierce competition in Madison, Wisconsin during the period of the alleged conspiracy and that there was no impact on commerce due to any exchange of price information.[24] The trial court's action as approved by the Wisconsin Supreme Court in reading an effect on commerce out of the elements of proof violated *United States Gypsum Co.*[25]

IV. THE PETITIONER WAS DENIED FULL AND FAIR HEARINGS WITH RESPECT TO ITS CLAIMS THAT ILLEGAL ELECTRONIC SURVEILLANCE HAD BEEN EMPLOYED BY THE STATE.

The Court held in *Stone v. Powell,* 428 U.S. 465 (1976) that there would be no review of Fourth Amendment claims in federal collateral relief proceedings unless the particular petitioner had been denied full and fair hearings with respect to claims of violations of the Fourth Amendment right to be secure against unreasonable searches and seizures. A separate right to full and fair

[24] The petitioner proved that it lost nearly $50,000 of annual business during the time of the alleged conspiracy.

[25] Instructing the jury to disregard paragraph 20 of the indictment also constituted an improper amendment which denied the petitioner its right to notice of the charges in violation of *DeJonge v. Oregon,* 299 U.S. 353 (1937) and *Cole v. Arkansas,* 333 U.S. 196 (1948). See part VI, *infra.*

hearings on Fourth Amendment claims is coextensive with that right and the general right to due process of law under the Fourteenth Amendment. Ordinarily such questions are resolvable by lower federal courts. However, the petitioner here is a corporation. There is a question concerning the availability of federal collateral relief since the custody command might prevent a corporation from obtaining access to a district court. Thus, this Court might be the only federal forum to obtain relief from all the federal rights violated including the denial of full, fair and impartial hearings in the search inquiry.

This case presents several classic examples of a denial of a right to proper hearings.[26]

The principal rights denied were:

1. On numerous occasions, the trial court admonished counsel that impeachment questions would not be allowed. Objections made by counsel for the State that questions were impeaching in nature were often sustained.

2. A hearsay report of Mr. Hecker was admitted into evidence by the trial court and utilized by the trial court in determining whether there was any electronic surveillance. The petitioner was told by Judge Maloney that the report would be accepted as a verity unless the petitioner called the maker of the report as a witness.

3. The petitioner did not receive the full detailed report from Mr. Hecker until the day the jury trial commenced. Thus, the petitioner was denied any right to be prepared for any hearing because Judge Maloney proposed to conduct the hearing before the full report was received and denied the petitioner's motions for adjournment to allow its counsel to confer with experts regarding the content of all reports.

[26] See Statement of the Case, pp. 29-38 for factual background.

4. The petitioner was denied the right to present evidence favorable to the petitioner. Originally, Judge Maloney indicated that the results of a lie detector test performed by John Reid of Chicago, Illinois would be admissible. The trial court said that if James Pellitteri failed that test, the case would be dismissed. James Pellitteri failed the lie detector test. The court refused to provide a hearing date when Mr. Reid could be present and instead received the report and discounted its conclusions based upon the court's own "expertise". The petitioner was denied its right to present evidence demonstrating the reliability of the polygraph examination of James Pellitteri.

5. The decision of Judge Jackman concerning electronic surveillance which was relied upon by the Wisconsin Supreme Court was in fact not reliable because in those hearings the petitioner was not allowed any examination whatsoever of the tape recordings which were acknowledged to be in existence by the State and by James Pellitteri.

6. The hearings before Judge Jackman were infected with the knowing use of false testimony as explained in part III above.

7. Judge Maloney failed to analyze whether any presumption of illegal electronic surveillance should be employed as a result of the State's knowing use of false testimony in 1973, coupled with the failure of the State to prove a legal source for its knowledge about the luncheon meeting at Namio's between Mr. Schultz and Mr. Standridge.

The decision of the United States Supreme Court in *Stone* assumed that state courts would be sensitive to federal issues involving the Fourth Amendment. Although there were lengthy hearings before Judge Jackman and Judge Maloney, the fact is that, taken as a whole, the

hearings were unfair because they should have been more solicitous of these important rights.

Judge Maloney held that the petitioner had established a *prima facie* case showing radio frequency signals emanating from its telephone at its City Disposal office in Madison, Wisconsin. However, Judge Maloney became fixed upon a July 21, 1975 trial date. He would allow no encroachment on that date. Therefore, hearings which were complex became truncated.

Judge Jackman, whose opinion was relied upon by the Wisconsin Supreme Court, did not even order the State to produce the original tapes acknowledged to be in existence for examination. The problems surrounding the knowing use of false testimony in the hearings before Judge Jackman and the refusal of Judge Maloney to come to grips with that issue have been discussed at length in part II.

It is extremely difficult to find the precise location of a radio transmitter associated with a phone. The electrical configurations and possibilities are virtually limitless. There can be really little doubt that the petitioner was at one point victimized with a wiretap. Phones simply do not emit radio frequency signals. Although the State never directly admitted any awareness of illegal electronic surveillance, the State in 1973 embarked upon a course of conduct which resulted in the introduction of false testimony concerning the source of its knowledge of a meeting between Mr. Schultz and Mr. Standridge and then was wholly unsuccessful in explaining its source of information when that falsity surfaced.

James Pellitteri who was an agent for the State at the time when Schultz met with Standridge failed a lie de-

tector test conducted by a world famous examiner. The court refused to set a date when John Reid of Chicago, Illinois could be present to testify that the lie detector test was reliable. Although there was nothing to prevent illegal electronic surveillance to have been conducted simultaneously with James Pellitteri making one-party consent tapes, the tapes acknowledged to be in existence should have been subjected to careful examination. The petitioner should have been given the right to carefully question the examiner after a sufficient period of time for preparation and certainly after having been provided with all of the reports prior to the hearing. The effect of the proposal of Judge Maloney was that the complete detailed report of Mr. Hecker would be provided after the hearings were closed. Thus any hearings would have been meaningless.[27]

Sustaining objections because questions are impeaching in nature is unheard of.

There are some inquiries which, due to their complexity must be protracted and which must consume a substantial period of time to be fair and complete. This is one of them. The Court should not allow state courts to trample upon these federal rights. A certain amount of monitoring of the activities of state trial and appellate courts in this area is necessary to preserve the integrity of the Court's reliance upon state courts to protect the federal Fourth Amendment right to be secure against unreasonable searches and seizures. The Court has not de-

[27] Tape 7 which was provided and set out in part at footnote 7, *supra*, is an unusual event. Mr. Pellitteri said that the unknown woman's voice was his mother. His mother denied that this was her voice. The unknown male voice was identified by Mrs. Pellitteri to be her son's. James Pellitteri denied that that was his voice and further testified that he had absolutely no idea what that event was doing on Tape 7 nor could he explain what it was all about.

fined what it means by a full and fair hearing. The petitioner believes that this would be an apporpriate case to discuss that question because there are so many violations.

V. THE WISCONSIN SUPREME COURT EMPLOYED AN UNCONSTITUTIONAL STANDARD IN DETERMINING THAT THE TRIAL COURT HAD NOT ERRED IN ITS FINDING OF NO ELECTRONIC SURVEILLANCE BY THE STATE; THE DECISION IS IN CONFLICT WITH FEDERAL COURTS; THE AFFIDAVITS OF STATE AGENTS ARE CONSTITUTIONALLY INSUFFICIENT.

The Wisconsin Supreme Court held that "the trial court's findings of no electronic surveillance by the State [not] to be against the great weight or clear preponderance of the evidence." 81 Wis. 2d 570, Ap. 9. This result by the Wisconsin Supreme Court was announced without benefit of analysis. The language of the decision of the Wisconsin Supreme Court strongly suggests that the burden of proof remained with the petitioner to show electronic surveillance, when the law is that the burden had shifted to the State upon a *prima facie* showing of electronic surveillance.[28]

The facts are that Judge Maloney and presumably Judge Jackman made findings that the petitioner had established a *prima facie* showing of radio frequency signals emanating from one of its phones. Under applicable Fourth Amendment law, the State was required to respond, since the burden of proof had shifted. It was the

[28] See Statement of the Case, pp. 18-21 for factual background.

obligation of the State to demonstrate the absence of illegal surveillance.

If the Constitution does not require a shifting of the burden of proof to the State after a showing of a *prima facie* case, then it could be virtually impossible for defendants to prove the existence of illegal electronic surveillance when the government or state officials denied the existence of such surveillance Discovering the precise location of electronic surveillance devices is enormously complex and costly. Indeed, the detection of the device itself in many circumstances is all but impossible. Mr. Justice Douglas' dissenting opinion in *United States v. White,* 401 U.S. 745 (1971) quotes from Senator Edward Long footnotes 5 and 6, to the effect that the number of devices is substantial and the cost of discovery is virtually prohibitive.

The State filed affidavits.[29] (R. 119-125, 127-129, 211-212; Ap. 45-50, 51-53, 53-55). The affidavits and for that matter the testimony of State Justice Department witnesses called by the petitioner, do not overcome the *prima facie* case established by the petitioner and are at odds with decisions of courts of appeal.

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[29] The State only called one witness who was a telephone company employee. Mr. Lein's testimony was that he could make no statement regarding the existence or non-existence of illegal electronic surveillance at the premises of City Disposal. All other witnesses were called by the petitioner. Some of these witnesses were agents or employees of the Justice Department of Wisconsin. These witnesses were called in an effort to establish a *prima facie* case. One witness, Assistant Attorney General Michael Zaleski, on examination commenced asserting privileges before Judge Jackman and refused to answer questions. Judge Jackman honored the privileges asserted. In any event, the State only affirmatively offered affidavits to refute the *prima facie* case.

The principal decision on this subject is *United States v. Alter,* 482 F.2d 1016 (9th Cir. 1973), where the court stated:

> "Alter's affidavits were sufficiently concrete and specific to make a prima facie showing that on the occasions described someone was interfering with his telephone calls and that the F.B.I. was involved. The burden was then on the Government squarely to affirm or to deny those charges. (Cf. United States v. Fannon (7th Cir. 1970) 435 F. 2d 364.) The Dierker affidavit did neither.
>
> "Mr. Dierker speaks in *conclusory terms.* He supplies no information whatever about the identity of the person or persons with whom he communicated, *the substance of his inquiries, or the substance of the replies.* He states no facts from which the court could conclude that the six agencies he lists are the only governmental agencies that could have been involved in electronic surveillance. Nor does the affidavit reveal the dates of claimed surveillance to which the inquiries were addressed. If any of the conclusions in the affidavit were later proved wrong, it would be virtually impossible to establish that the affidavit was perjured. (Cf. Bronston v. United States (1973) 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed. 2d 568.)" (Emphasis supplied.)

The affidavits here presented are only in conclusory terms; no information about the identity of persons talked to was stated, the substance of inquiries and replies were not presented. Facts are not presented for illumination of the Court and dates are missing.

Implicit in the decision of the Wisconsin Supreme Court is a position either that the burden of proof had not shifted to the State or that the affidavits presented are constitutionally acceptable. Either position is in violation of the decisions of a substantial number of courts of ap-

peal which have faced similar questions. In this case, the burden of proof clearly shifted by the specific holding of Judge Maloney and the implied holding of Judge Jackman that a *prima facie* case of illegal electronic surveillance had been proven by the petitioner. The affidavits presented by the State and relied upon by both trial judges and by the Wisconsin Supreme Court are clearly unacceptable responses according to decisions of courts of appeal. Thus there is a conflict between the Wisconsin Supreme Court and federal courts on this important question.

VI. FEDERAL DUE PROCESS RIGHTS WERE VIOLATED WHEN SUBSTANTIAL AMENDMENTS TO THE GRAND JURY INDICTMENT WERE ALLOWED.

The petitioner was charged by the grand jury in the charging paragraph of the indictment with violating the second sentence of §133.01(1), Wis. Stats. That sentence is inapplicable to service industries such as the petitioner's. By a series of formal deletions to the charging paragraph of the indictment prior to trial, the charging paragraph was changed to come close to the language of the first sentence of §133.01(1), Wis. Stats., which is the Wisconsin "little" Sherman Act.[30]

The petitioner objected to all amendments by deletion and formally moved the trial court for a preliminary hearing asserting that the indictment had become an information under Wisconsin law and an information cannot be filed without a preliminary hearing.

[30] See Statement of the Case, pp. 38-39 for factual background.

There is little question that these wholesale deletions to a grand jury indictment would violate federal law were this a federal prosecution. In *Ex Parte Bain,* 121 U.S. 1 (1887), the Court held that a judge does not have power to strike language from the charging part of an indictment. The present status of the law was summed up in *Stirone v. United States,* 361 U.S. 212, 215-217 (1960):

> "Ever since *Ex Parte Bain,* 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. *In that case, the court ordered that some specific and relevant allegations the grand jury had charged be stricken from the indictment so that Bain might be convicted without proof of those particular allegations.* In holding that this could not be done, Mr. Justice Miller, speaking for the Court said: 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed' 121 U.S. 1, 10. "The Court went on to hold in *Bain:* '. . . that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney. . . .' 121 U.S. 1, 13 *"The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.* See also *United*

States v. Norris, 281 U.S. 619, 622 (1930). Cf. *Clyatt v. United States,* 197 U.S. 207, 219, 220 (1905). Yet the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other states nor does the Court of Appeals appear to have so read it *The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete.* And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. *Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.* And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous." [Emphasis supplied].

See also *Russell v. United States,* 369 U.S. 749 (1962).

However, this Court held in *Hurtado v. California,* 110 U.S. 516 (1884) that the Fifth Amendment guarantee of a right to be indicted by a grand jury was not applicable to the states through the Fourteenth Amendment. Cf. *Palko v. Connecticut,* 302 U.S. 319, 323 (1937). Thus, states could substitute a preliminary hearing process followed by the filing of an information prepared by the prosecuting attorney for a grand jury proceeding. The specific holding of the Court in *Hurtado* was:

> "Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, *after examination and commitment by a magistrate, certifying to the probable guilt of the defendant,* with the right on his part to the aid of counsel, and to the cross examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law...." 110 U.S. at 538. (Emphasis supplied).

The Court was not confronted with the situation where the State provided neither a grand jury nor a preliminary hearing. The effect of the numerous amendments to the indictment in this case presents just that issue. The petitioner contends that a state as a matter of due process of law cannot deprive a criminal defendant of both a grand jury and a preliminary hearing. When the indictment was amended in this wholesale fashion, as a matter of federal constitutional law, it was no longer the charge of the grand jury but became the charge of the Attorney General. In that case, a preliminary hearing should have been required as a matter of due process of law.

The Wisconsin Supreme Court held that the petitioner was not misled by these changes because they were made prior to trial and further held that the amendments to the indictment were matters of form rather than substance. The latter part of its decision is totally at odds with *Ex Parte Bain, supra,* and *Stirone v. United States, supra,* and the former part violates a need for a preliminary finding of probable cause either by a grand jury or in a preliminary hearing.

The Wisconsin Supreme Court did not discuss another amendment which was made by Judge Maloney. As pointed out previously in part III, Judge Maloney amended the indictment by deleting those paragraphs of the indictment which alleged an actual effect upon commerce and in particular paragraph 20. As recognized

by the Court in *Stirone,* an indictment can be amended just as effectively by the process of jury instruction.

As also discussed in part III of this petition, the petitioner's principal defense was an economic one to show that there was no impact upon commerce. Thus, the petitioner hoped to prevail by completely discrediting that part of the grand jury charge which it was obligated to defend against, namely, that its alleged actions had an alleged effect upon commerce. The heart of the defense was cut out when the trial court charged the jury that the State was not obligated to prove any impact whatsoever upon commerce.

Thus, the petitioner was not sufficiently apprised of the charges which it had to defend against. The petitioner assumed that the charge contained in the grand jury indictment would be the charge which went to the jury. During the instruction conferences, after the evidence was closed, the trial court changed the charge. This procedure violated the petitioner's right to know the nature of the charges against it and specifically violates *DeJonge v. Oregon,* 299 U.S. 353 (1937) and *Cole v. Arkansas,* 333 U.S. 196 (1948). As the Court said in *Cole:*

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and the chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. (citing a case) If, as the State Supreme Court held, petitioners were charged with a violation of §1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is

> as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201.

As recently recognized by the Court in *U. S. Gypsum Co., supra,*

> "The behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case — the exchange of price information among competitors — is illustrative in this regard."

Some alleged conduct which is in the gray zone requires proof of an effect upon commerce while other alleged violations do not require such proof. The grand jury in this case after hearing evidence concluded that proof of an effect upon commerce was required in this case. That is what was contained in its indictment. At the conclusion of the trial, the trial court changed that charge by eliminating the requirement of proving an effect upon commerce. Such a change deprived the petitioner's due process right to notice of the specific charge. This action violated decisions of this Court.

VII. THE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHEN A JURY INSTRUCTION WAS AMENDED IN THE MIDDLE OF CLOSING ARGUMENT TO THE JURY.

Presumably the command of Rule 30, Federal Rules of Criminal Procedure, that:

> "The court shall inform counsel of its proposed action upon the requests [for instructions] prior to

> their arguments to the jury, but the court shall instruct the jury after the arguments are completed,"

contains a procedure of constitutional, due process dimension. Wisconsin procedure requires an instruction conference prior to argument and requires the court to "inform counsel . . . of the instructions it proposes to submit." Section 805.13(3); 972.01, Wis. Stats.

In this case, all counsel stipulated pursuant to §805.13 (4), Wis. Stats, that the jury be instructed prior to closing argument. Thus, Judge Maloney had instructed the jury with respect to the standard Wisconsin instruction on advising juries about corroborating evidence and the reliability of the testimony of accomplices.[31]

James Pellitteri was obviously an accomplice by his own admission. The Wisconsin standard instruction does not contain any limitation with respect to time when an accomplice is an accomplice for cautioning a jury about reliability and corroborating evidence. Despite this, in the middle of the closing argument counsel for the State interrupted counsel for the petitioner to point out that Mr. Pellitteri was not an accomplice after January 15, 1973 and Judge Maloney stated that the jury was aware of that fact. In its context, Judge Maloney effectively amended the standard instruction in the middle of closing argument.

The Wisconsin Supreme Court in its opinion on this issue appeared to agree that the accomplice instruction was changed but held rather inexplicably that this issue was waived because the petitioner's counsel had never asked the trial court for an informer instruction.[32] Just

[31] See Statement of the Case, pp. 41-45 for factual background.

[32] On January 15, 1973, James Pellitteri ceased being a member of any alleged conspiracy by becoming an informer for the State.

how the issue concerning the changing of an instruction during the course of argument is waived under these circumstances is difficult to comprehend. This is especially true since practically all authorities agree that an informer instruction and an accomplice instruction are coextensive so that when one is given in a case the other need not be given. See, generally, Devitt and Blackmar, Federal Jury Practice and Instructions, §12.02 and *United States v. Gonzales,* 491 F.2d 1202 (5th Cir. 1973), rehearing denied, 494 F.2d 1296 (1974).

The effect of the changing of the instruction in the middle of the argument was to convey improperly to the jury that James Pellitteri's testimony was more worthy of belief without requiring corroboration when he moved from the status of accomplice to assume the status of informer. The interruption was unwarranted and the comment by the court which effectively changed the instruction violated the petitioner's right to due process of law.

VIII. THE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE ASSISTANT ATTORNEY GENERAL "TESTIFIED" DURING CLOSING ARGUMENT TO THE EFFECT THAT EVIDENCE EXISTED WHICH WOULD BE HARMFUL TO THE PETITIONER BUT WHICH WAS NOT PRODUCED AND THAT THE PETITIONER WAS RESPONSIBLE FOR THE DENIAL OF RECEIPT OF SUCH EVIDENCE.

Shortly following the interruption discussed in part VII above, the counsel for the petitioner was again interrupted when he was arguing about the lack of corrobo-

rating evidence for James Pellitteri.[33] During a discussion the Assistant Attorney General in front of the jury stated to counsel for the petitioner *"You know very well why we couldn't get evidence on that."* (Emphasis supplied). The effect of the comment was a smear of counsel for the petitioner in the presence of the jury during closing argument. As it turned out, there was no evidence withheld and there was no evidence involved which the State could not have obtained had they wanted to obtain such evidence.[34] Thus, the interruption and the comments were improper and the arguments of counsel for the petitioner were in fact proper.

The Wisconsin Supreme Court on appeal stated:

> "The defendant moved for a mistrial on the grounds that the prosecutor erred in testifying about matters not in the record. *The trial court struck the prosecutor's remark,* but refused to grant the mistrial." (Emphasis supplied). 81 Wis. 2d at 581, Ap.

The Wisconsin Supreme Court misstated the record on this critical point. The trial court never struck the prosecutor's remark. The trial court refused to give any instruction to correct this situation even though the petitioner proposed several alternatives. All the trial court did in direct response to the motion for a mistrial was to deny the motion for the mistrial. That denial without more had the effect of giving some credibility to the improper statement of counsel for the State.

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[33] See Statement of the Case, pp. 41-46 for factual background.

[34] Counsel for the petitioner had no idea what Assistant Attorney General Strawn was talking about. In a conference outside of the presence of the jury, Assistant Attorney General Strawn indicated that counsel for the petitioner's argument on the lack of fingerprint evidence or handwriting analysis was improper argument. Judge Maloney ruled that the argument was proper and further stated that the State could have obtained such evidence if it wanted to prior to the trial and that nothing done by the petitioner had prevented them from obtaining such evidence.

Trial judges have substantial duties to prevent this kind of conduct on the part of prosecutors and prosecutors have specific duties not to infect a trial with such interruptions of argument which are unwarranted and contain unfounded attacks upon counsel. Courts have universally held that it is improper conduct for a prosecutor to refer to evidence not in the record. See A.B.A., The Prosecution Function, Standard 5.9.

United States v. Latimer, 511 F.2d 498 (10th Cir. 1975) is directly on point. Latimer was accused of robbing a bank. During closing argument the defense argued about the absence of surveillance cameras. The prosecutor stated that the camera had malfunctioned and that the film showed the presence of an FBI agent arriving after the incident. The Court of Appeals reversed and granted a new trial.

In *United States v. Peak,* 498 F.2d 1337 (6th Cir. 1974) the prosecutor in closing expressed an opinion as to the defendant's character. The Court, in reversing stated:

> *"Absent the prompt and stern admonition of the trial judge,* we would consider such a prejudicial comment grounds for reversal or mistrial in any close case." (Emphasis supplied) *Id.* at 1338.

In *United States v. Jenkins,* 436 F.2d 140 (D.C. Cir. 1970) an attempt was made to convict by argument beyond the scope of evidence introduced.

> "Such tactics are inconsistent with the civilization of the law and endanger the integrity of its administration. *They should be condemned by the trial court sua sponte in the presence of the jury."* (Emphasis supplied) *Id.* at 145.

Repeating the comments of Chief Justice Burger in *United States v. Dinitz,* 424 U.S. 600, 612 (1976) with respect to overreaching by a defense attorney,

> "To make statements which will not or cannot be supported by proof is, as it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.
>
> *"A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct."* (Emphasis supplied)

The Court has not considered the scope of professional misconduct which might arise in closing argument and their due process implications. Surely the admonition of the Chief Justice in *Dinitz* is correct and should be applied with even greater vigor to prosecutors who engage in such conduct. The Wisconsin Supreme Court dismissed this part of the appeal by the erroneous assumption that Judge Maloney had acted promptly in accordance with the constitutional requirement to prevent such matters from infecting a jury. In fact, Judge Maloney did nothing. Thus, the decision of the Wisconsin Supreme Court in the context of the true factual situation is in conflict with circuit courts throughout the country which have addressed this question and presumably in conflict with applicable decisions of this Court.

IX. PROSECUTORS, AS A MATTER OF DUE PROCESS OF LAW SHOULD BE REQUIRED TO TRANSMIT EXCULPATORY EVIDENCE TO A GRAND JURY FOR THEIR CONSIDERATION.

The tape recordings of telephone conversations which had been turned over to the State by James Pellitteri disclosed a significant exculpating conversation between James Pellitteri and Mr. Standridge, an employee of the petitioner. In that conversation, Mr. Standridge stated that James Pellitteri asked him to state what price Pellitteri should quote to a City Disposal customer. Mr. Standridge refused stating that such conduct bordered on price fixing which is illegal.[35] This exculpating testimony was not presented to the grand jury. The Wisconsin Supreme Court held that all that was required was that this exculpating evidence be divulged to the defense and impliedly held that exculpating evidence did not have to be presented to the grand jury by a prosecutor.

Several federal courts are now exploring this issue. A recent discussion appears in *United States v. Phillips Petroleum Company,* 435 F. Supp. 610 (N.D. Okla. 1977) where the Court stated:

> "It is important to the proper functioning of the Grand Jury that it be apprised of the essential information which will allow it to make an informed and independent judgment as to whether it is appropriate to return an indictment in a given case. *United States v. Braniff Airways, Inc.,* 428 F.Supp. 579 (W.D. Tex. 1977); *United States v. DeMarco,* 401 F.Supp. 505 (C.D. Cal. 1975), *aff'd,* 550 F.2d 1224 (9th Cir. 1977); *Wood v. Georgia,* 370 U.S. 375, 390, 82 S. Ct. 1364, 8 L.Ed.2d 569 (1962); *Johnson v. Super-*

[35] See Statement of the Case, pp. 46-47 for factual background.

> *ior Court*, 38 Cal.App.3d 977, 113 Cal.Rptr. 740 (1974), *aff'd*, 15 Cal.3d 248, 124 Cal.Rptr. 32, 539 P.2d 792 (1975). As the Supreme Court said in *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973), the mission of the Grand Jury *'is to clear the innocent, no less than to bring to trial those who may be guilty.'* (emphasis supplied and footnote omitted). A requirement that the prosecutor disclose evidence which he knows will tend to negate guilt is consistent not only with *United States v. Braniff Airways, Inc., supra, United States v. DeMarco, supra,* and *Johnson v. Superior Court, supra,* but also with ethical standards espoused by the American Bar Association."

The Court concluded in the *Phillips Petroleum* case that the failure to disclose exculpatory evidence "is an independent abuse of the Grand Jury which must result in the dismissal of the entire indictment." 435 F. Supp. at 620. See also, *United States v. Provenzano*, 440 F. Supp. 561, 566 (S.D.N.Y. 1977). The decision of the Wisconsin Supreme Court is in conflict with this growing recognition of due process rights before a grand jury. A grand jury cannot perform its function "to clear the innocent" as espoused in *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973) if prosecutors are not required to disclose exculpating evidence to the grand jury.

CONCLUSION

A corporation convicted of a crime following violations of its federally guaranteed constitutional rights might find it difficult to obtain collateral relief in a United States District Court. The federal constitutional questions presented are substantial and might never be

resolved with respect to this defendant due to District Court jurisdictional difficulties unless this Court reviews the conviction.

The petitioner respectfully requests that the Court grant its petition for a writ of certiorari to the Supreme Court of the State of Wisconsin.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977

No.

WASTE MANAGEMENT OF WISCONSIN, INC., d/b/a CITY DISPOSAL COMPANY,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

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APPENDIX OF PETITIONER

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DECISION OF WISCONSIN SUPREME COURT

STATE, Respondent, v. WASTE MANAGEMENT OF WISCONSIN, INC., d/b/a City Disposal Company, Appellant.

No. 75-421-CR. Argued October 31, 1977. — Decided January 3, 1978.

APPEAL from a judgment and order of the circuit court for Dane county: NORRIS MALONEY, Circuit Judge. *Affirmed.*

FACTS.

The defendant-appellant, Waste Management of Wisconsin, Inc., doing business in Dane county as City Disposal Company, was convicted of consipiring to restrain trade in the garbage hauling industry in Dane county in violation of sec. 133.01(1), Stats.

On February 28, 1973, a grand jury indicted Waste Management, along with McKinley Standridge, its general manager in Dane county, for conspiring to restrain competition in the garbage hauling business. The indictment charged defendants with conspiring to allocate customers and to submit rigged bids for garbage hauling services. Also named as unindicted conspirators were Tony Pellitteri Trucking Service, Inc., and Jerry Beecher, doing business as Doug's Sanitation Service, Inc. The alleged conspiracy included the submission of rigged sealed bids to the University of Wisconsin, the Forest Products Laboratory, the Veterans Administration and the United States Army Reserve.

On July 31, 1975, following a nine-day trial, and after two earlier mistrials, a jury acquitted the defendant, Mc-

Kinley Standridge, and convicted the defendant, Waste Management. The trial court imposed a $4,000 fine and denied all of the defendant's motions for postconviction relief. Waste Management appeals.

For the appellant there were briefs by *Robert H. Friebert, D. Jeffrey Hirschberg* and *Friebert & Finerty* and oral argument by *Robert H. Friebert,* all of Milwaukee.

For the respondent the cause was argued by *Alan M. Lee,* assistant attorney general, with whom on the brief were *Bronson C. La Follette,* attorney general, and *William L. Gansner,* assistant attorney general.

[1]

ROBERT W. HANSEN, J. An appellate court is not a performing bear, required to dance to each and every tune played on an appeal. Here appellant raises twenty-nine challenges to a judgment of conviction. However, we find the challenges to fit into five categories and will discuss each category. Any of the twenty-nine issues raised and not discussed in any of the five categories can be deemed to lack sufficient merit or importance to warrant individual attention.

I. CHALLENGES TO SUFFICIENCY OF INDICTMENT.

The indictment by the grand jury stated that "the offense charged and the acts stated were contrary to sec. 133.01(1) and (3), Stats."[1] Subsection (1) contains six

[1] At the time the indictment was handed down sec. 133.01(3), Stats. 1973, provided: "Whoever violates sub. (1) may be fined not more than $5,000 or imprisoned not more than 5 years or both." This penalty section has since been amended to distinguish between corporations and private persons. Ch. 224, sec. 111c, 1975 Wis. Laws, effective May 5, 1976.

sentences. Only the first two are here involved. The first sentence declares illegal every "contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce." The second sentence declares "[e]very combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition *in the supply-or price of any article or commodity* . . ." to be an illegal restraint of trade. [Emphasis supplied.]

The charging portion of the indictment charged that the defendants and the coconspirators "did feloniously engage in an unlawful combination and conspiracy intended to restrain competition in the supply or price of an article or commodity." Before the first trial,[2] the Honorable W. L. JACKMAN held that waste removel was not "an article or commodity" and therefore was not within the scope of the second sentence, but that the indictment alleged acts which, "if true, would constitute a violation of sec. 133.01(1), particularly, the first sentence." Before the second trial, the trial judge, the Honorable NORRIS MALONEY, granted the state's motion to amend the indictment to state that "the defendants . . . did . . . engage in an unlawful combination and conspiracy to restrain trade or commerce in this state." This amendment did no more than incorporate into the language of the indictment Judge JACKMAN's earlier order that the indictment charged an offense under the first sentence of sec. 133.01(1). In effect, the amendment struck the references to acts "intended to restrain competition in the supply or price of an article or commodity," leaving the allegation as to conspiracy "to restrain trade or commerce in this state."

[2] The first trial resulted in a hung verdict, and the trial judge presiding declared a mistrial.

[2-4]

The amendment here permitted was in the nature of a formal deletion of words, not a substitution of one charge for another. Deleted was the reference to the second sentence of sec. 133.01(1). Remaining was reference to the first sentence of that statute. The test in this state is whether the defendant was prejudiced by this change.[3] As with an information, an indictment must inform the accused of what particular acts he is alleged to have committed.[4] Notice to the accused, not perfection in draftsmanship, is the key. Thus, where an indictment enables the defendant to understand the offense charged so that he can prepare his defense, "designation even of a completely wrong statute has been held not to vitiate an information or indictment."[5] Similarly, our court refused to quash an indictment which cited a relevant statute but failed to include one element of the crime where the defendant and the jury were apprised of the elements that the state would need to prove to get a conviction.[6]

---

[3] *See:* Sec. 971.26, Stats., which provides: "No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."

[4] *Liskowitz v. State,* 229 Wis. 636, 641, 282 N.W. 103 (1939).

[5] *Wagner v. State,* 60 Wis.2d 722, 728, 729, 211 N.W.2d 449 (1973).

[6] *State v. Nowakowski,* 67 Wis.2d 545, 571, 227 N.W.2d 697 (1975), this court held that: "In this case the violation in the indictment was stated with reference to the section numbers of the statutes which were alleged to be violated. The trial court in the case at bar advised the parties prior to trial that the state would have to prove intent and an instruction on intent was given to the jury. Thus the defendant was apprised of the statutory violation with which he was charged and the elements that the state would need to prove in order to get a conviction."

[5]

In the case before us, the defendant was informed long before trial that the state was required to proceed solely on the theory that the defendant violated the first and not the second sentence of sec. 133.01(1). This amendment in the indictment is no foundation for a claim of prejudice. The amended indictment charged this defendant with the crime of which he was convicted, and he knew well in advance of trial what that crime was.

The important question is whether the indictment charged a crime under the first sentence of sec. 133.01 (1), Stats. The defendant contends that the state antitrust statute cannot be applied to customer allocation or price fixing in service industries because of the existence of the second sentence.[7] It is contended that because the second sentence prohibits restraints in the supply or price only of articles or commodities, garbage haulers, and others in service industries, can fix prices and allocate territories with impunity. This contention was raised in the *Milwaukee Braves Case.*[8] While the *Braves* decision ultimately rested on other grounds, as to the claim that the second sentence restricts the meaning of the first, this court concluded: "[T]he insertion of the second sentence in 1921 did not limit the broad language of the first or

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[7] For legislative history of the enactment of the Wisconsin antitrust act, and the addition of the second sentence of sec. 133.01(1) in 1921, *see: State v. Milwaukee Braves, Inc.,* 31 Wis.2d 699, 715, 716, 144 N.W.2d 1 (1966), certiorari denied, 385 U.S. 990 (1966).

[8] The court stated the position of defendants to be that: "[T]he exhibition of major league baseball games is the supply of a service, not an article or commodity, and that sec. 133.01 prohibits only restraints of trade or commerce in articles or commodities. The claim is that the second sentence in the section restricts the meaning of the first and third sentences." *Id.* at 714. The court rejected this position.

third sentences to the types of combination described in the second."[9]

[6-8]

It is true, as the defendant asserts, that in the *Braves Case* the court also said: "[T]he first sentence of sec. 133.01(1), Stats., still embraces other types of restraint of trade not specifically enumerated or described."[10] But to read this sentence as meaning that all restraints "enumerated" in the second sentence are excluded from the first is not consistent with the *Braves Case* as a whole. The Major League's concerted refusal to deal with the Milwaukee Brewers was one act for which the League was convicted, and that act was a restraint on the supply of a service — baseball in Milwaukee. In the *Braves Case* we did not find that the first sentence prohibition against this restraint on trade was erased by the fact that this practice also affected the price or supply of a service. While the *Braves Case* held only that the second sentence did not, by reason of its reference to articles or commodities, limit the subject of the first sentence, we now hold that the specific activities prohibited by the second sentence are also prohibited by the first. This holding is particularly apt where, as here, the conspiracy alleged goes well beyond an agreement to fix prices. While impact upon prices is involved, conspiracy here alleged was basically an allocation of customers. One party to the conspiracy was to be given territorial-type rights to a particular customer, including state and federal agencies of government, while the other parties were to submit noncompetitive bids to insure that this allocation of "turf" was not upset. In holding that the second sentence of the statute is but

[9] *Id.* at 716.

[10] *Id.* at 715.

one nonexclusory example of conduct prohibited by the first sentence, we are in accord with a long line of state cases holding that the broad variety of anticompetitive practices prohibited by the Sherman Act[11] are illegal under the state act.[12] Acts found to be illegal restraints upon trade under the first sentence of the Wisconsin antitrust act are not decriminalized by the second section of sec. 133.01 even though they may affect supplies and prices of a service instead of an "article or commodity."

II. *ILLEGAL ELECTRONIC SURVEILLANCE.*

Before the first and second trials there were extensive evidentiary hearings on defendant's claim of illegal electronic surveillance by the state. At the first such hearing witness Jim Pellitteri testified that on advice of his attorney he taped his telephone conversations with the defendant which he later turned over to the state and on three occasions wore a microphone given him by the state to monitor conversations with employees of the defendant. On this and other evidence adduced at the hearing Judge JACKMAN concluded that the tapes were lawful one-party consent tapes made by Pellitteri and that no other electronic surveillance was conducted by the state. Before the second trial a second evidentiary

[11] The Sherman Act, 15 U.S.C., sec. 1 (1973), has been recognized to apply to restraints in services as well as commodities since *Atlantic Cleaners & Dryers v. United States,* 286 U.S. 427 (1932).

[12] We have stated many times that the construction of sec. 133.01(1) is controlled by federel decisions under the Sherman Act. *Madison v. Hyland, Hall & Co.,* 73 Wis.2d 364, 375, 243 N.W.2d 422 (1976); *State ex rel. Nordell v. Kinney,* 62 Wis.2d 558, 563, 215 N.W.2d 405 (1974); *John Mohr & Sons, Inc. v. Jahnke,* 55 Wis.2d 402, 410, 198 N.W.2d 363 (1972); *State v. Lewis & Leidersdorf Co.,* 201 Wis. 543, 549, 230 N.W. 692 (1930); *Pulp Wood Co. v. Green Bay Paper & Fiber Co.,* 157 Wis. 604, 625, 147 N.W. 1058 (1914).

hearing was held. Jim Pellitteri also took a polygraph test to determine whether his version of the making of tapes was true. On the basis of the two hearings and the polygraph test, Judge MALONEY found that the tapes were lawful one-party consent tapes and that the defendant proved no other electronic surveillance by the state. The tapes which Pellitteri made and turned over to the state were not introduced as evidence before the grand jury at the trial.

[9]

On this appeal defendant claims that both trial courts erred in finding no proof that the state engaged in illegal electronic surveillance. As in the granting or denying of a motion to suppress evidence, the findings of fact of the trial courts here will be sustained unless they are against the great weight and clear preponderance of the evidence.[13] This court will not substitute its judgment for that of the trial court in matters of credibility.[14]

[10-12]

The general rule is that evidence obtained by the state by means of an illegal electronic surveillance violates the Fourth Amendment and must be suppressed.[15] In the case before us, two trial courts found that the challenged tapes were made by Pellitteri. This finding of fact is not challenged on appeal. They are, as both trial judges found, one-party consent tapes which are not "searches" within

[13] *Bies v. State,* 76 Wis.2d 457, 469, 251 N.W.2d 461 (1977); *State v. Pires,* 55 Wis.2d 597, 602, 603, 201 N.W.2d 153 (1972).

[14] *Turner v. State,* 76 Wis.2d 1, 250 N.W.2d 706 (1977).

[15] *See: Katz v. United States,* 389 U.S. 347, 354 (1967); *Berger v. New York,* 388 U.S. 41, 51 (1967); *Stat ex rel. Arnold v. County Court,* 51 Wis.2d 434, 187 N.W.2d 354 (1971).

the compass of the Fourth Amendment.[16] As to the existence of further illegal electronic surveillance by the state, both trial judges found that this did not occur. While there is contradictory evidence in the records of the two evidentiary hearings, we cannot conclude the trial courts' findings of no electronic surveillance by the state to be against the great weight and clear preponderance of the evidence.

[13]

The defendant also sees error in the trial court's finding that witness Pellitteri did not tape his conversations with employees of the defendant to injure defendant within the meaning of sec. 968.31(2)(c), Stats. Under that statute one-party consent tapes are lawful unless the communication "is intercepted for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act." The trial court's finding of fact was that the witness' purpose in making the tapes was to protect himself from prosecution. That finding is not against the great weight and clear preponderance of the evidence. A federal court has stated that in taping one's own telephone conversations or permitting another to do so, "[A]ll parties have a right to proceed under the law and to protect their own rights."[17] We will not disturb the trial court's finding that this witness was doing just that.

[16] *United States v. White,* 401 U.S. 745 (1971).

[17] In *Meredith v. Gavin,* 446 F.2d 794, 799 (8th Cir. 1971), the federal appeals court held: "It does seem that by using the term 'injurious act' in conjunction with 'criminal and tortious acts,' it was intended to reach certain kinds of harmful conduct which might not strictly be criminal or tortious. The scope of such harmful conduct must be determined on a case-by-case basis. However, it seems apparent from the context in which the statute was enacted that the sort of conduct contemplated was an interception by a party to a conversation with an in-

Our holding that the witness was entitled to tape his telephone conversations with the defendant's employees to protect himself from prosecution leaves the defendant little room to argue that the witness was not entitled to turn those tapes over to law enforcement authorities, as he did, in exchange for a grant of immunity. But defendant contends that this turnover is prohibited by sec. 968.29, Stats. Subsections (1), (2) and (5) of that statute authorize the disclosure of the contents of authorized interceptions by law enforcement authorities for enumerated investigatory purposes. Subsection (3) of the statute permits the use of authorized interceptions by "[a]ny person . . . *only* while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury . . ." [Emphasis supplied.] The defendant contends that since Pellitteri was not himself a law enforcement officer he can use or disclose the tapes only as permitted under sec. 968.29(3), Stats., while giving testimony under oath in a court proceeding. It claims that turning the tapes over to the state does not satisfy this rule.

[14-15]

In holding that one-party consent tapes are lawful in Wisconsin, a holding we here reaffirm, our court stated: "Interception is one thing; disclosure as evidence in court is another. In declaring interceptions with consent of one party 'not unlawful' the act recognizes the need of this investigative tool to detect crime, but in denying its use as evidence the statute recognizes in the balance the right

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tent to use that interception against the non-consenting party in some harmful way *and in a manner in which the offending party had no right to proceed.*" [Emphasis supplied.]

of privacy of free people."[18] Therefore, in *Arnold* our court held that the admissibility of the contents of electronic surveillance was governed exclusively by sec. 968.29(3), Stats. Although one-party consent tapes are lawful, they are not "authorized by ss. 968.28 to 968.33" and therefore the contents cannot be admitted as evidence in chief.[19] But it is to the use of the contents as evidence that the limitation upon disclosure in sec. 968.29(3), Stats., applies. It is to the use of the contents as evidence that the "only under oath" requirement applies. As was held in the *Arnold Case,* it is the "admissibility into evidence of the contents of eavesdropping interceptions" that is "governed solely by sec. 968.29(3), Stats."[20] Our court has refused to apply the *Arnold* holding so as to prohibit an undercover agent who monitored his conversation with a prostitute to testify about that conversation because, although the fruits of the surveillance were not admissible, the surveillance was not prohibited.[21] The Pellitteri tapes were not "authorized" under sec. 968.29(3). They were turned over to a law enforcement agent and were not admitted as evidence. Sec. 968.29(3) does not prohibit this use.

[16]

The prosecutor in his opening statements to the grand jury referred to the fact that the witness Pellitteri made tapes that he turned over to the state. The defendant claims that this reference also violated sec. 968.29(3), Stats. However, this reference to the existence of the tapes was not a disclosure of the contents of tapes, and for the

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[18] *State ex rel. Arnold v. County Court, supra,* n. 15, at 442.

[19] *Id.* at 444.

[20] *Id.* at 422.

[21] *State v. Smith,* 72 Wis.2d 711, 716, 242 N.W.2d 184 (1976).

same reasons that the transfer of the tapes to the state did not violate sec. 968.29(3), Stats., the prosecutor's reference to the tapes did not violate that statute.

[17]

Nonetheless, the reference was improper. Because under *Arnold* the tapes themselves could not be used in evidence, it was unfair for the prosecutor to refer to them.[22] However, the judge instructed the jury to disregard all comments of the attorneys, and the indictment the jury handed down is supported by testimony sufficient to establish probable cause.[23] Under these circumstances the prosecutor's reference to the tapes does not warrant, much less require, quashing the indictment.

III. *SUFFICIENCY OF THE EVIDENCE TO CONVICT.*

[18, 19]

This defendant was convicted of a conspiracy in restraint of trade under the first sentence of sec. 133.01(1), Stats. To its contention that the state failed to prove an overt act in furtherance of such conspiracy, the short answer is that the state was not required to prove overt acts. Except for the fact that the state act applies to intrastate commerce while the federal act applies to interstate commerce, what amounts to a conspiracy in restraint of trade

[22] *Gaertner v. State*, 35 Wis.2d 159, 168, 169, 150 N.W.2d 370 (1967).

[23] *State ex rel. Welch v. Waukesha Co. Cir. Court*, 52 Wis.2d 221, 224, 189 N.W.2d 201 (1971); *State v. Lawler*, 221 Wis. 423, 435, 267 N.W. 65 (1936).

under the Sherman Act amounts to a conspiracy in restraint of trade under the Wisconsin antitrust act.[24]

The long-standing construction of the Sherman Act, first stated by the United States Supreme Court in *Nash v. United States*, is that proof of a conspiracy in restraint of trade does not require overt acts: "Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing — that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability."[25] Thus we need not examine this record to determine whether, as the state contends, overt acts were here established by credible evidence. The state in the case at bar was required to prove only a conspiracy in restraint of trade, not overt acts in furtherance of such conspiracy.

[20, 21]

Nor was the state required, as defendant contends, to prove an actual effect upon commerce. Market or customer allocation,[26] bid rigging,[27] and price fixing[28] are per se violations of the Sherman Act. Therefore, these practices are per se violations of the state antitrust act.

[24] *John Mohr & Sons, Inc. v. Jahnke, supra*, n. 12. *See also*, other cases cited in n. 12, *supra*.

[25] *Nash v. United States*, 229 U.S. 373, 378 (1913).

[26] *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 574, 575 (2d Cir. 1961); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 720 (S.D.N.Y. 1969), affirmed 417 F.2d 621 (2d Cir. 1969) (per curiam).

[27] *Addyston Pipe & Steel v. United States*, 175 U.S. 211, 235-244 (1899); *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794, 797, 798 (E.D. Pa. 1965).

[28] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

Anticompetitive practices that are illegal per se are among those "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[29] By reference to federal law, we hold that the state needed only to prove an agreement to fix prices, rig bids or allocate customers and did not need to prove an actual injury to competition.

[22]

The amended indictment, as did the original indictment, charged the defendant with engaging in a single conspiracy with coconspirators Pellitteri and Beecher. Judge MALONEY instructed the jury that a verdict of guilty required a finding of a single conspiracy. The defendant contends that the state failed to establish a single overall conspiracy, which has been defined by the federal court in *United States v. Varelli* to be: "Various people knowingly joining together in furtherance of a common design or purpose."[30] According to the defendant, at best, the state proved only a series of multiple conspiracies, and therefore the defendant was not convicted for the single crime charged. In distinguishing between a single conspiracy and a series of multiple conspiracies, in *Varelli* the court held: "In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the

[29] *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 5 (1958).

[30] 407 F.2d 735, 742 (7th Cir. 1969).

parties constitutes a single conspiracy."[31] Applying this test of common goal or purpose in the case before us, we hold that the jury could reasonably have concluded, as it did, that all three conspirators, Waste Management, Pellitteri and Beecher, conspired for the common purpose of allocating customers between them and that they rigged bids and fixed prices to accomplish this shared design or purpose.

[23]

Pellitteri testified that he and the defendant had an agreement to rig bids, allocate customers and fix prices, and that while this conspiracy continued,[32] Beecher, at Pellitteri's suggestion, contacted an employee of the defendant, Peter Abeles, and joined this conspiracy. The defendant had recently bought out two other local haulers, Eckel Sanitation and Phil Pellitteri Trucking. There was evidence that first Pellitteri, and later Beecher, entered into an agreement with the defendant in order to protect the defendant's business position during the consolidation period in return for similar favors from the defendant. This constitutes a single and continuing conspiracy, joined by another, for, as the *Varelli Case* holds: "New parties may join the agreement at any time while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies."[33] On this record, the jury, acting reasonably, was entitled to find one overall conspiracy, and we affirm the jury's verdict.

[31] *Id.* at 742.

[32] Both sides agree that when Pellitteri agreed to turn over the tapes to the state on January 15, 1972, his conspiracy with the defendant terminated.

[33] *United States v. Varelli, supra,* n. 30, at 742.

But even if a finding of one overall conspiracy is not supported by the record, the result is nothing more than a variance between the indictment and the proof, and the verdict must be set aside only if this variance prejudiced the defendant.[34] The defendant concedes that there was evidence, though it calls the evidence "slim," of one conspiracy to restrain trade between the defendant and Pellitteri and a second conspiracy between the defendant and Beecher. Each conspiracy is contrary to sec. 133.01 (1), Stats.

The defendant argues that if multiple conspiracies were proved, the United States Supreme Court case of *Kotteakos v. United States*[35] requires the conviction to be set aside. In *Kotteakos* thirty-two defendants were indicted as coconspirators in a single conspiracy to make fraudulent federal loan applications. Some of the defendants were convicted while other defendants were not. The government conceded that although one overall conspiracy was alleged, multiple conspiracies were proved. The Court held that it was prejudicial error to try all the defendants together, because, since the law of conspiracy permits the acts and declarations of one conspirator to bind other members of the conspiracy,[36] it was impossible to tell if the jury used the proper evidence in determining whether to convict each defendant.[37]

---

[34] *Kotteakos v. United States,* 328 U.S. 750 (1946).

[35] *Id.*

[36] *Id.* at 770. For the Wisconsin statement of the rule that evidence of the acts and declarations of one conspirator bind a coconspirator, *see: State v. Adams,* 257 Wis. 433, 43 N.W.2d 446 (1950); *Schultz v. State,* 133 Wis. 215, 225, 113 N.W. 428 (1907).

[37] *Id.* at 771.

[24]

But here the charging of the defendant and one of its agents, Standridge, did not trigger the *Kotteakos* problem. Here the acts of the defendant Standridge were attributable to Waste Management, not on a theory of conspiracy but on a theory of agency. Where the only two defendants are a corporate conspirator and its agent, the *Kotteakos* problem of prejudice does not arise. No prejudice would have resulted from charging Waste Management and its agent with one conspiracy, but proving multiple conspiracies at trial.

IV. *ERRORS IN THE GRAND JURY PROCEEDINGS.*

[25-30]

Since none of the six challenges to the grand jury proceedings involve significant issues of law, discussion of them will be summary. (1) The defendant complains that the state improperly elicited testimony of the witness Jerry Beecher that because he had heard the defendant was "a Chicago run outfit" and "linked with Mafia or whatever," he was afraid of it. The indictment was amply supported by other credible evidence. This bit of testimony was not prejudicial and is no basis to attack the indictment. (2) The defendant contends that the court's admonition to the grand jury witnesses "to inform no one of the questions asked of you and the answers given by you, except your attorney," interfered with its ability to prepare a defense. Such an admonition was proper. In this state grand jury proceedings are secret in order to protect the jurors and the public.[38]

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[38] *State v. Krause,* 260 Wis. 313, 50 N.W.2d 439 (1951).

Moreover, on appeal the defendant has not cited a single example of how it was hindered by this admonition in preparing its defense. (3) The trial judge entered the grand jury room, at the request of a witness who asked that a judge confirm the fact that he had no right to have his attorney present. The defendant argues that the presence of this "stranger" was error. But the judge's entry did "not occur at a time when the jury [was] deliberating or voting on the indictment" and "is not grounds for quashing an indictment unless prejudice to the accused is shown."[39] No prejudice to this defendant was shown. (4) The defendant claims the prosecutor was constitutionally obliged to elicit testimony concerning an exculpatory colloquy between witness Pellitteri and the defendant's general manager Standridge that is on the tapes. The contents of the tapes were not admissible under *Arnold,* and the information they contained was made available to defendants at their request before trial. That is all that was here required.[40] (5) The defendant contends that the opening and closing statements of the prosecutor should have been recorded. Under the applicable statute, grand jury proceedings need not be recorded unless so ordered at the direction of the judge.[41] (6) The defendant finally challenges the state's failure to turn over to the defendant all transcripts of grand jury proceedings. In fact the trial court turned over to the defendant transcripts of all witnesses' testimony except transcripts of witnesses whose testimony

[39] *State v. O'Connor,* 77 Wis.2d 261, 277, 252 N.W.2d 671 (1977).

[40] *See: Nelson v. State,* 59 Wis.2d 474, 208 N.W.2d 410 (1973).

[41] Sec. 255.13(1), Stats., provides: "Every grand jury shall *when ordered by the judge* ordering such grand jury, employ one or more competent reporters to attend their sessions and to make and transcribe a verbatim record of all proceedings had before them." [Emphasis supplied.]

involved public officials not involved in this case. Sec. 971.23(1), Stats., only requires the state to disclose to the defendant before trial the defendant's grand jury testimony.[42] The defendant's contention that the disclosure of grand jury proceedings was here insufficient is unsupported by state law.

V. *ERRORS DURING THE TRIAL.*

[31-37]

The claims of error during the trial raised by defendant on this appeal include the following: (1) The defendant complains that the jury list for the trial did not contain the names of jurors numbered in the panel list from 87 to 141. This, the defendant claims, denied him a jury chosen by lot.[43] On the record the trial judge explained that, with the knowledge of the other circuit judges, he divided the panel list into two working units so that one unit could work for one portion of the term, and the second for another. The defendant does not allege any deliberate discrimination in the removal of fifty-five consecutive names. This procedure departed from the statutory [illegible] the defendant must be actully prejudiced thereby,[44] and he has failed to

[42] *See also: Steensland v. Hoppmann,* 213 Wis. 593, 599, 252 N.W. 146 (1934).

[43] Sec. 255.04, Stats.

[44] *Pamanet v. State,* 49 Wis.2d 501, 509, 182 N.W.2d 459 (1971), in which this court held: "[T]he general rule is that statutes prescribing the mode of drawing a jury panel are directory, and irregularities in carrying out such provisions are not material unless the defendant is prejudiced thereby and that is the rule followed in this state." Citing 5 Wharton's, *Criminal Law and Procedure,* p. 82, sec. 1956; *Petition of Salen,* 231 Wis. 489, 491, 286 N.W. 5 (1939); *Ullman v. State,* 124 Wis. 602, 609, 103 N.W. 6 (1905).

allege or prove prejudice. (2) During the defendant's closing argument counsel referred to the lack of corroborative evidence regarding two pieces of paper on which, Pellitteri testified, one of the defendant's agents Abeles had written some quotations for bids. The prosecutor objected to this argument stating that, "You know very well why we couldn't get evidence on that." The record shows that at the time of trial Abeles was outside the jurisdiction of the court and was challenging extradition from Illinois, but that the jury was not told of this fact. The defendant moved for a mistrial on the grounds that the prosecutor erred in testifying about matters not in the record. The trial court struck the prosecutor's remark, but refused to grant a mistrial. We hold that the trial judge did not abuse his discretion in concluding that the defendant was not denied a fair trial by reason of this remark.[45] (3) The defendant makes many challenges to the jury instructions. The court gave an instruction involving the weight to be given the testimony of an accomplice. The defendant did not request a similar instruction involving the weight to be given the testimony of an informer. During closing arguments the trial judge told the jury that the witness Pellitteri was no longer an accomplice after January 15, 1972, the date he became an informer. The defendant contends that this statement may have led the jury to believe it could give greater weight to Pellitteri's testimony after January 15 than before. Since both parties agreed at the time of trial that Pellitteri was no longer a coconspirator after January 15, 1972, we hold that the defendant has waived any claim of error concerning the effects of the court's instructions by not requesting an informer instruction. The trial court instructed the jury that after

[45] *Hoppe v. State,* 74 Wis.2d 107, 120-122, 246 N.W.2d 122 (1976).

Pellitteri withdrew from the alleged conspiracy, any declarations of Abeles and Pellitteri could not be used as evidence against the defendant Standridge unless it first found that Standridge was a member of the conspiracy. The defendant Waste Management claims it was entitled to a similar instruction. But Waste Management's acts are the acts of its agents, Standridge or Abeles, and any statements of Abeles or Standridge bind Waste Management as the principal and not as a coconspirator. Thus the trial court did not err in refusing the defendant's request. The defendant's objection to the instruction that a person is presumed to intend the natural consequences of his deliberate acts is without merit in Wisconsin.[46] The instruction that after Pellitteri withdrew from the conspiracy his actions could not be used against either of the two defendants was an adequate instruction on proof of conspiracy,[47] and the court was not required to give the additional instruction requested by the defendant. Because we have held in this opinion that in proving price fixing, bid rigging and market allocation the state was not required to prove an actual injury to competition, we uphold the trial court's refusal to instruct the jury that evidence of competition between coconspirators creates an inference that no conspiracy existed.

As to the other challenges to the instructions, as well as to the other challenges to the judgment of conviction, we find no basis for reversal.

By the Court. — Judgment and order affirmed.

[46] *See: Garcia v. State,* 73 Wis.2d 174, 183, 242 N.W.2d 919 (1976); *State v. Johnnies,* 76 Wis.2d 578, 587, 251 N.W.2d 807 (1977).

[47] *See* n. 36, *supra.*

The State of Wisconsin
SUPREME COURT CHAMBERS
MADISON
53702

January 23, 1978

BRUCE F. BEILFUSS
CHIEF JUSTICE
NATHAN S. HEFFERNAN
LEO B. HANLEY
CONNOR T. HANSEN
ROBERT W. HANSEN
ROLAND B. DAY
SHIRLEY S. ABRAHAMSON
JUSTICES

ROBERT J. MARTINEAU
EXECUTIVE OFFICER
ROBERT O. UEHLING
CLERK

Mr. Robert H. Friebert
Friebert & Finerty
710 N. Plankinton Ave.
Milwaukee, WI 53203

Re: State v. Waste Management of Wisconsin, Inc.
#75-412-CR

Dear Mr. Friebert:

The motion for rehearing in the above matter was filed this date. Pursuant to your request, the Court has granted permission for an extension of time within which you may serve and file your brief in support of such motion to February 13, 1978. Your brief should not exceed 15 pages in length.

Very truly yours,

/s/ Robert O. Uehling
Robert O. Uehling
Clerk of Supreme Court

ROU/sb
cc: Marvin I. Strawn, 512-L
Asst. Attorney General

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Marilyn L. Graves,
Acting Clerk

Madison, March 3, 1978

Marvin I. Strawn, 512-L
Asst. Attorney General

To

Robert H. Friebert
Friebert & Finerty
710 N. Plankinton Ave.
Milwaukee, WI 53203

The Court today announced decision in your case as follows:

75-412-CR—State of Wisconsin v. Waste Management of Wisconsin, Inc.

MOTIONS FOR REHEARING DENIED
WITHOUT COSTS

Respectfully yours,

Marilyn L. Graves,
Acting Clerk of Supreme Court.

SUPREME COURT OF THE UNITED STATES

No. A-933

WASTE MANAGEMENT OF WISCONSIN, INC.,
Petitioner,

v.

WISCONSIN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 31, 1978.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 4th
day of May, 1978.

2596

DECISION ON MOTIONS

(Caption and Formal Parts Omitted)

The Court has decided the defendants' pre-trial motions as follows: Motions 10 and 11, dealing with the subject of electronic eavesdropping, are considered in a separate opinion.

Motions 1, 2, 4, 5. These motions have been denied from the Bench. The indictment in its present form, charging defendants with violating the first sentence of Sec. 133.01, Stats., will stand.

Motion 3. Any motion alleging a fatal variance between pleading and proof is properly a post-trial motion. Should the evidence at trial reveal, in defendants' opinion, such a variance, the Court will entertain a renewal of this motion. Consideration of the motion will be deferred until that time.

* * * *

Motion 7. The indictment does in fact allege overt acts. See for instance Par. 18(d). In addition, in construing the provisions of Sec. 133.01, the Court should follow Federal Court interpretation of the Sherman Act. *John Mohr & Sons, Inc. v. Jahnke,* 55 Wis. 2d 402 (1972). Under the Sherman Act, no overt acts, other than the conspiracy to fix prices or restrain trade in itself, need be shown to obtain a conviction. See cases in 15 U.S.C.A. 1, Note 496. The motion is denied.

* * * *

Motion 22. The motion to dismiss for lack of a preliminary hearing was properly denied from the Bench. Under the law applicable to the case at the time it was brought, no preliminary hearing was required in an indictment situation. *State ex rel. Welch v. Waukesha County Court,* 52 Wis. 2d 221 (1971).

2600 *Motion 23.* The defendants ask dismissal because of the failure of the State to inform them at the Grand Jury stage of an arguably exculpatory statement on one of the Pellitteri tapes. The statement was given to the defendants well in advance of the first trial of the case. Prosecutors have a duty to furnish exculpatory material to the defendants for trial. No case cited by the defendants, or of which the Court is aware, extends that duty to the Grand Jury stage of the proceedings. The motion is denied.

* * * *

Dated: July 16, 1975.

By The Court:
/s/ *Norris Maloney*
Norris Maloney, Circuit Judge

2602 DECISION ON MOTIONS
RE: ELECTRONIC SURVEILLANCE
(Caption and Formal Parts Omitted)

If the State, or anyone acting under the direction of the State, engaged in illegal electronic surveillance of the defendants, evidence resulting from that unlawful activity would have to be suppressed as fruits of the poisonous tree. To decide whether or not the defendants have been the subjects of illegal electronic surveillance, the Court has examined the transcripts of the evidentiary hearings held before Judge Jackman and before this Court, the transcript of the first trial in this case, and reports from polygraph operator John Reid and Dr. Michael H. L. Hecker of the Stanford Research Institute. From this material, the Court has had to answer two principal questions: (1) Did the Pellitteri tapes constitute illegal interception of oral communications, and (2) Aside from the Pellitteri tapes, did the State engage in illegal electronic surveillance of the defendant corporation's office?

I. The Pellitteri Tapes

Interceptions of telephone conversations did occur in this case. James Pellitteri made 8 tapes of telephone conversations between himself and McKinley Standridge and Peter Abeles, officials of Waste Management. Pellitteri testified that he made these tapes with a suction cup device attached to the phone in his own office. According to Sec. 968.31(2)(c), Stats., this is not unlawful.

2603 "For a person not acting under color of law to intercept a wire or oral communication where such person is party to the communication * * * unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of commtting any other injurious act."

Therefore, if the tapes were made in the manner described by Pellitteri, the interceptions were lawful unless Pellitteri made them for the purpose of committing a criminal, tortious or injurious act.

(A) *Were the tapes made by the suction cup method?*

With the exception of microphone dictation he occasionally made, Pellitteri testified, he used no recording method other than the suction cup method. The tape recorder, suction cup, and microphone Pellitteri said he used were introduced into evidence as Exh. 11-13 in this Court's hearings.

By stipulation of the parties the Court requested Dr. Michael H. L. Hecker of the Stanford Research Institute as the Court's witness to analyze the tapes and equipment in question to determine whether they were made by a method other than the suction cup method. Hecker found no evidence that the tapes he examined were not made by the method, and on the equipment that Pellitteri said they were.

Pellitteri submitted to a polygraph examination by John Reid and Associates of Chicago. The relevant portion of Reid's report states:

> "There were significant emotional disturbances indicative of deception on this subject's polygraph records on the following listed questions:
>
> (1) Were all the tape recordings of telephone conversations with City Disposal done with a suction cup device? Answer: Yes.
>
> (2) Did you or do you know of anyone who used electronic eavesdropping devices at the Belt Line Court office of City Disposal? Answer: No.
>
> (3) To your knowledge or did you or has anyone altered or edited the conversation originally recorded on any of the 8 tapes? Answer: No.
>
> 2604 (4) At the time you entered into a Gentleman's Agreement with City Disposal was it your intention to injure or cause harm to the City Disposal Company? Answer: No.
>
> It is the opinion of the examiner, based on this subject's polygraph records, that he is not telling the truth on the above listed questions."

The Court makes a Finding of Fact that the tapes were recorded by the suction cup method. The testimony of both Pellitteri and Gillman, plus the equipment introduced in evidence, is consistent with this Finding. The examination performed by Dr. Hecker supports this explanation of the origin of the tapes. The Court gives great weight to the scientific evaluation of the physical evidence — the tapes themselves — by the Court's expert. The Court believes this to be the best evidence on the question of the method by which the tapes were recorded.

The only evidence for the proposition that the tapes were not made as Pellitteri said they were is Reid's evaluation of Pellitteri's response to Question 1 on the polygraph examination. That examination, to be sure, throws some doubt on Pellitteri's credibility. However, on the precise question of how the tapes were recorded, the polygraph examination deserves less weight than the expert examination of the physical evidence by Dr. Hecker. An evaluation of Pellitteri's emotional response with respect to a question about the tapes is of less importance than an evaluation of the tapes themselves in answering the Court's question. In addition, the conditions under which the test was made, and Pellitteri's emotional state during the test, as revealed in Reid's June 11, 1975 supplemental report reduce the weight which the Court accords to the test.

The anomalies on various tapes (the dictation over a portion of a conversation with a customer on tape 3; the fugitive noises and fragmentary conversations at the end of tape 7) do not alter the Court's Finding of Fact. They do not show that the tapes were recorded, even in part, by a method other than the suction cup method. While Pellitteri's testimony about these anomalies (e.g.

his denial of dictating over telephone conversations) is
2605 shown to be erroneous or disingenuous by a reasonable evaluation of the portions of the tapes in question, as heard by the Court and fortified by the Stanford Report, such mistakes do not go to the basic question with which the Court is faced — the method used by Pellitteri to record conversations with Standridge and Abeles.

(B) *Did Pellitteri make the tapes for the purpose of committing a tortious or injurious act?*

The defendants have consistently contended that Pellitteri's purpose in making the tapes and bringing them to the attention of the Department of Justice was to commit a tortious or injurious act; namely, to drive City Disposal (the local incarnation of Waste Management), a feared competitor, out of business by contriving to have City Disposal prosecuted and its corporate charter revoked for antitrust violations.

What, in context of 968.31(2)(c), constitutes an injurious act? No Wisconsin cases, and only one Federal case (construing 18 U.S.C.A. 2511(d), the identically-worded Federal equivalent of Sec. 968.31(2)(c)) have dealt with this question. *Meredith* v. *Gavin,* 446 F. 2d 794 (8th Cir., 1971) presents a sensible analysis, holding that a use of a taped conversation "to protect the defendants' position, not to positively harm the plaintiff" *Meredith* at 799, did not constitute an injurious act. The court further explained its position as follows:

> "It does seem that by using the term 'injurious act' in conjunction with 'criminal and tortious acts', it was intended to reach certain kinds of harmful conduct which might not strictly be criminal or tortious. The scope of such harmful conduct must be determined on a case-by-case basis. However, it seems apparent from the context in which the statute was enacted that the sort of conduct contemplated was an interception by a party to a conversation with an intent to use that interception against the non-consenting party in some harmful way and in a manner in which the offending party had no right to proceed."

Pellitteri testified that City Disposal was a major competitor of his company as of November, 1971. He felt that City Disposal was a serious threat to his business, though his business made substantial profits in 1972. Pel-
2606 litteri feared he was party to an illegal arrangement with City Disposal and on advice of counsel began to make tapes in order to protect himself. He did not know at the time he started to make the tapes that a corporation could lose its charter for anti-trust violations. He admitted he would have been helped competitively if Waste Management were to lose its charter.

Bruce Gillman, Pellitteri's attorney, testified that Pellitteri informed him on January 15, 1972 for the first time that Pellitteri had an agreement with City Disposal involving a possible price-fixing. Pellitteri was worried that City Disposal would start a price war against him. Gillman felt that the agreement violated the anti-trust laws, but did not discuss the law with Pellitteri. In particular, Gillman did not discuss Sec. 133.21 Stats., the provision containing the charter revocation penalty, with his client. On January 15, 1972 Gillman advised Pellitteri to purchase recording equipment and demonstrated the use of the suction cup on the telephone to him.

Gillman went to Assistant Attorney General Michael Zaleski to inform him of the situation on January 31 and February 3, 1972. Zaleski told Gillman that immunity

for his client was likely, but not certain. On February 3, 1972, Gillman had no assurance from Zaleski that any investigation or prosecution of anyone would occur, though he was later informed that an investigation would take place. Gillman did not discuss the charter revocation penalty with the Attorney General's office for some time after the first batch of tapes had been turned over to that office on February 3, 1972.

Gillman denied any intent to harm City Disposal, and doubted that a prosecution would harm City Disposal economically. His purpose was to get City Disposal and its illegal agreement off Pellitteri's back. Gillman received no assurances that Pellitteri's corporation would not be prosecuted, and felt that any prosecution against City Disposal was City Disposal's problem.

2607 Paul Gossens, the prosecutor in the previous trial of this case, said that the "fountainhead" of the case was Gillman's visit to Zaleski, but that the testimony of Schultz and Beecher was likewise vital to the decision to take the case to court.

The Court makes a Finding of Fact that the purpose of Pellitteri and Gillman in making the tapes and calling them to the attention of the Attorney General was self-protection. While they could not have helped being aware that their action could potentially have adverse consequences for City Disposal (and apparently did not have any great concern for City Disposal's welfare) the testimony does not demonstrate that they possessed an intent to affirmatively harm City Disposal. Nor does the testimony indicate that they acted in a manner in which they had no right to proceed. Taking action to head off possible prosecution of oneself — even if the action can rebound to the detriment of a competitor — is not equivalent to taking action to affirmatively harm that competitor. Any citizen has a right to bring knowledge he may have of wrongdoing to law enforcement officials. From the evidence the Court cannot infer a scheme by Pellitteri and Gillman to drive City Disposal out of business by resorting to Sec. 133.21 or otherwise to injure the defendants

It should be pointed out that Question 4 on the polygraph test is not responsive to the Court's inquiry. The Court is not interested in Pellitteri's state of mind at the time (in November, 1971) he entered into an agreement with City Disposal; it is interested in the purpose for which Gillman and Pellitteri made the tapes and called them to the attention of the Department of Justice.

CONCLUSION OF LAW

Based on its Findings that Pellitteri made 'one-party consent" tapes by the suction cup method on his office phone for the purpose of protecting his own interests, without intent to tortiously harm the defendants, the Court concludes that the Pellitteri tapes are lawful under Sec. 968.31(2)(c) Stats.

2608 *II. Was there illegal electronic surveillance of the offices of City Disposal by the Department of Justice or anyone acting under its direction?*

There is no evidence to support involvement by Pellitteri in electronic surveillance of City Disposal's offices. Question 2 of the polygraph report, even if given more weight than the Court is willing to give it, and even assuming that Pellitteri displayed "emotional disturbances indicative of deception" in answering it, this is not helpful. The question is phrased in the disjunctive. As defen-

dants pointed out in their brief with respect to Motion 9, disjunctive phrasing (not involving merely a string of synonyms) leads to a confusing and meaningless result. The Court is unwilling to infer from Reid's evaluation of Pellitteri's answer to a poorly-framed question that Pellitteri in fact engaged in illegal electronic surveillance of City Disposal's offices.

(A) *Did defendants make a prima facie case that a telephone at City Disposal's offices was the subject of electronic surveillance on March 16, 1973?*

John Wiedow, an investigator hired by defendants, went on March 16, 1973 to the offices of City Disposal. On going into an office occupied by John Wilson, an employee of City Disposal, he received a loud squeal from the headsets of his detecting devices and a high reading on the machine's "RF indication meter." The squeal sounded like feedback. The indicator needle peaked over Wilson's telephone. Wiedow removed the cover from the telephone and unscrewed from terminals in the phone two wires. The squeal then stopped, though he could still get a squeal if he put his machine's antenna within a few inches of the now-disconnected wires. He manually traced the wires back to the terminal box in the basement, finding nothing unusual, and no transmitter nor any wire lead-in to the terminal box from an outside transmitter. The phone worked normally with the two wires disconnected. Wiedow concluded from the machine response that there was RF (radio frequency) energy being emitted by a transmitter somewhere along the line but off the premises, but he didn't take the precaution to look for it on the nearest telephone pole. Wiedow returned to the same location four days later and got no response from his machine.

2609 All of Mr. Sokol's testimony hangs on the thin thread of the inexperienced Mr. Wiedow's incompetent haphazard examination of the premises.

Edward Sokol, defendant's electronic expert witness, testified that Wiedow's machine is an insensitive one, requiring a strong source of RF energy to produce a response like that Wiedow obtained. Therefore, Wiedow must have been in the presence of an intense field, as would be produced by a strong transmitter. Sokol's opinion, based on the testimony of Wiedow, was that there was a transmitter on the premises or nearby attached to the telephone line going to Wilson's phone and capable of being used to transmit voice signals picked up by the telephone mouthpiece. Sokol believed the transmitter was probably in the basement. Sokol thought that the two wires unhooked by Wiedow acted as a broadcasting antenna. Had Wiedow followed the signal on his machine along the telephone line, he would have been able to discover the location of the transmitter. Sokol estimated that a 10-50 watt transmitter, an inch thick by four or five inches, would have been needed to produce the result Wiedow obtained.

On April 24, 1973, Dennis Lein, a telephone company test foreman, inspected the telephone in question. He noted the wires — a yellow-slate pair from an orange binder — had been pulled loose. Normally, these wires were spare leads which would have been stored in the telephone for future use, not tied down to terminals as Wiedow claimed he found them. The wires could have been used as antenna, he thought. Lein followed the wires in question to the basement terminal box and found no indication of any tampering. He found no indication of electronic surveillance or wiretapping.

Taken together, this evidence (weak as it is) establishes a prima facie case (at least as strong as that in *Beverly* v. *U.S.*, 468 F. 2d 732 (1972) and *U.S.* v. *Alter*, 482 F. 2d 1016 (1973)) that on March 16, 1973, there was a source of RF energy somewhere on the line attached to the telephone in John Wilson's office. The Court does
2610 not make a finding that in fact the telephone was the subject of electronic surveillance. No transmitter was ever discovered. Nor was any showing ever made that any source of RF energy tied to the phone line in question ever broadcast, or that anyone ever received any conversations made on that phone.

The prima facie case made by the evidence is a limited one. No testimony tied the RF signal to Pellitteri, his tapes, the Department of Justice, or any evidence introduced before the Grand Jury or at trial. There is no evidence to support the existence of RF energy emanating from Wilson's telephone prior to or after March 16, 1973. The Court cannot infer from its presence that day that it existed on any other day. There is evidence, indeed, that only four days later there was no RF energy present.

The Court discounts the whole tempest in a teapot concerning the alleged February 7, 1973 meeting at Namio's between Standridge and Schultz. The testimony showed clearly that as of May and June, 1975, Phil and James Pellitteri, Paul Gossens, Carl Zahn and Richard Schultz were, collectively, hopelessly confused as to who told whom about the meeting when. To infer from this confusion that the Attorney General learned about the meeting via electronic surveillance would require a more breathtaking leap of logic than the Court is prepared to make.

(B) *Did the State adequately deny involvement in any electronic surveillance of City Disposal's offices that might have occurred?*

The defendants contend that, a prima facie case of electronic surveillance having been made, the State must officially deny involvement. This rule, based on Federal cases such as *Alter, Beverly, U.S.* v. *Marx*, 451 F. 2d 466 (1st Cir., 1971); *In re Grumbles*, 453 F. 2d 119 (3d Cir. 1971); *In re Horn*, 458 F. 2d 468 (3d Cir., 1972); and *Korman v. U.S.*, 486 F. 2d 926 (7th Cir., 1973), arose in the context of civil contempt actions against reluctant grand jury witnesses who attempted to justify their refusals to testify by alleging illegal electronic surveillance of themselves or their attorneys. It is questionable whether the same rule should apply in the present fact situation.
2611 No Wisconsin case has considered this rule in either the grand jury or trial context.

Even assuming, arguendo, that it is proper to apply this rule to this case, the Court finds that the Department of Justice has adequately denied participation in any illegal electronic surveillance. Zaleski, Gossens, Marvin Strawn, Peter Peshek and Daniel Milan all submitted affidavits dated June 12, 1973, denying personal knowledge of electronic surveillance of the defendants by the Department. The affidavits of Strawn and Gossens, the two attorneys working most closely with the case, also denied knowledge of such surveillance by any grand jury witness or informant (a category including James Pellitteri). Ernest Smith and Frank Meyers, nonattorney employees of the Department of Justice connected with the investigation, denied knowledge of or participation in electronic surveillance of the defendants (other than assisting Pellitteri with his taping, in Smith's case) under

oath before Judge Jackman. Such a testimonial denial is as good as an affidavit for these purposes.

Gossens made a second affidavit on June 22, 1973. The affidavit states that Gossens contacted the Attorney General, Deputy Attorney General, Administrator of the Division of Criminal Investigation, and supervising attorneys of the Criminal Prosecution Unit and the Criminal Anti-Trust Division of the Department of Justice. Gossens also had access to all files concerning the defendants. Based on this knowledge, Gossens swore that no warrants authorizing electronic surveillance of the defendants had been issued, that no information concerning electronic surveillance had been destroyed or lost, and, most significantly, that the

> "corporate defendant, its agents, officers, employees or the attorneys of any of the above have not been the subject of any electronic surveillance at the instance of or under the control of the Attorney General, any of his assistants or agents, or any informants supplying information to the Department of Justice since these defendants were indicted."

The indictments were handed down February 28, 1973. The affidavit therefore covers March 16, 1973, the only date for which a prima facie case of electronic surveillance exists.

2612 This affidavit by Gossens, the "prosecutor personally in charge of the investigation," *Korman* at 931, satisfies the *Korman* test. The defendant had the opportunity to examine Gossens about the contents of the affidavit when he appeared before this Court in May, but did not do so. While *Alter* appears to require an affidavit in some ways more elaborate than Gossens' June 22nd document, *Korman*, the 7th Circuit case, does not. *Horn, Beverly, Grumble* and *Marx* all accepted considerably less informative affidavits. The Court holds that Gossens' affidavit, taken together with the other affidavits and denials, is sufficiently specific and comprehensive to constitute an adequate denial that the State, or anyone acting at its direction, engaged in electronic surveillance of City Disposal's offices.

CONCLUSION OF LAW:

The State cannot be charged with engaging directly or through any agent in illegal electronic surveillance of the defendant corporation's offices.

On the basis of the Findings and Conclusions it has made, the Court denies Defendant's Motion 11. The objective of Motion 10, which asked for hearings and the development of evidence on the question of electronic surveillance, has been achieved. Any requests in Motion 10 for investigation or the development of evidence beyond that already a part of the record on this issue is denied.

Dated: July 17, 1975.

By The Court:
/s/ *Norris Maloney*
Norris Maloney, Circuit Judge

2613

ADDENDUM

Motion No. 1 on the sheaf of motions dated July 15, 1975 relates to an improper question asked upon trial by Mr. Gossens relative to the defendant corporation having been "involved in bid-rigging" at a previous time, which such improper question was objected to and sustained by Judge Jackman with an admonition to the jury to disregard the same.

Defendants' contention is based upon an alleged rule of law that a new trial should not be allowed following a mistrial for misconduct on the part of the prosecutor when such misconduct was prompted by a desire to avoid a verdict of acquittal which was probably due to inadequate evidence, or, in other words, conduct on the part of the prosecutor intended to get a "second kick at the cat" with better evidence on a second trial.

The mistrial in this case was granted because of a hung jury, and the principle of law alleged by the defendants is totally inapplicable.

However, in view of the fact that this Court did allow testimony bearing upon the subject matter of the purposes of the prosecutor, I hereby make the Finding of Fact that Mr. Gossens' highly improper question was prompted not because of a fear that he had already lost the case, but out of the spirit of overzealousness in an attempt to counteract the testimony of Mr. Standridge that he had joined the defendant corporation because of their outstanding reputation.

Dated: July 17, 1975.

By The Court:
/s/ *Norris Maloney*
Norris Maloney, Circuit Judge

99 DECISION ON MOTION TO DISMISS

(Caption and formal parts omitted)

Appearances: Plaintiff by Paul Gossens, Assistant Attorney General
Defendants by John D. Finerty and Allen L. Samson

The complaint very clearly alleges that the conspiracy "x x x intended to restrain competition in the supply or price of an article or commodity x x x." It then goes on to allege that this was achieved by agreement to submit rigged bids and by allocation of jobs. The defendants take the position that waste removal is a service, not an article or commodity. Plaintiff takes the position that, reading the indictment as a whole, it is not material that waste removal may not be a service, since the allegations do show a restraint of trade. Plaintiff also contends that waste removal is a commodity.

A combination or conspiracy to fix prices or restrain trade in a service industry is illegal under the Sec. 3 of the Sherman Act which is almost identical with the first sentence of Sec. 133.01. U.S. v. Nat. Asso. R.E.B., 339 U.S. 485, 94 L. Ed. 1007, and cases cited therein. The allegations of paragraph 17 of the indictment, if true, would constitute a violation of Sec. 133.01(1), particularly the first sentence. U.S. v. Pa. Refuse Removal Asso., 242 F.S. 794, 357 F. 2d 806.

Plaintiff's contention that waste removal is a "commodity" or "articles" is not, in our opinion, sound. Plaintiff relies upon McKinley Tel. Co. v. Cumberland Tel. Co., 152 Wis. 357, 362. It might also have added Bowles v. Wheeler, 152 F. 2d 34 (log booming and rafting); Burns v. Donahue, 79 F S 107 (storage); Beechley v. Mulville, 70 N.W. 107 (insurance); Hamilton Mfg. Co. v. Mass., 6 Wall. 632, 18 L. Ed. 904. Defendants have cited numerous cases to the contrary.

100 We think that, as used in Sec. 133.01(1), "article" is used in the sense of a particular commodity, a thing for sale, as defined by Webster. And commodity means an article that is bought and sold, and not in the obsolete

sense of a convenience or advantage. We are of the opinion that the words article and commodity should be given their generally accepted meaning of tangible personal property as used in commerce, as, for instance, furniture or corn.

It is unfortunate that the indictment even mentioned article or commodity, as it was not necessary, in our belief. Any attempt to equate the service of scavengers with those who deal in goods seems rather far fetched to us and we do not accept such a construction.

We are of the opinion that the particulars set forth in paragraphs 17 and 18 do clarify the meaning of the indictment so that defendants cannot mistake what acts plaintiff claims were unlawful. The draftsman of the indictment was in error in describing the conspiracy as one to restrain competition in the supply or price of an article or commodity. But he did go on to describe the offense as one of bid rigging for service. We are of the opinion that the defect is a formal one which does not prejudice either of the defendants because they are fully informed of the precise character of the offense charged. Sec. 971.26. The error is one of description, which is clarified and made quite certain in the following paragraphs, so that the descriptive error is quite apparent. An indictment is sufficient if it specifies with clarity the act or acts constituting the offense and the section of the statute violated. We are of the opinion that the indictment is sufficient in the light of Sec. 971.26.

It is our opinion that the indictment is a sufficient allegation of an offense under the first sentence of Sec. 133.01 standing alone. Defendants, however, contend that that sentence is modified by the second sentence which applies only to trade in articles and commodities.

In State v. Milwaukee Braves, 31 Wis. 2d 699, 716, it is said: "x x x we conclude that the insertion of the second sentence in 1921 did not limit the broad language of the first or third sentences to the types of combination described in the second." We think this answers defendants' contention that no offense has been stated.

For the reasons above stated, it is hereby

ORDERED: That defendants' motion to dismiss the indictment for failure to allege an offense is denied.

Dated June 4, 1973.

BY THE COURT

/s/ *W. L. Jackman*

Judge

702 DECISION OF JUDGE JACKMAN OF MOTION AND ORDER TO DISMISS BECAUSE OF ALLEGED ELECTRONIC SURVEILLANCE

(Caption and Formal Parts Omitted)

Appearances: Plaintiff by Paul Gossens, Assistant District Attorney; Defendants by Robert Friebert and Robert Sutton.

The evidence shows that the witness Pellitteri did by an electronic device record telephone conversations to him and that he also attempted to record personal conversations with an employee of defendant corporation. There were recordings made with the consent of Pellitteri who was a party to conversations with others. The tapes of these conversations were furnished to the Attorney General.

There was also evidence produced to prove that a telephone at the offices of the defendant corporation was

bugged to permit electronic surveillance of calls on that phone. The evidence tended to show that a private detective had used a testing device which indicated an in-put of RF energy in the phone. There was no electronic eavesdropping device found. We cannot find that the state had any part of any electronic eavesdropping related in any way to alleged phone tapping of the office phone of defendants. There was no evidence of any entrance of unauthorized persons to the office building. We cannot find that the State was in any way involved in any electronic eavesdropping of telephone communications at or near defendants' office.

The only evidence of electronic recording or eavesdropping is the recording of conversations with Pellitteri and he was the one who conducted the recording of the conversations. This was not ground for dismissal of the prosecution. State ex rel Arnold v. County Court, 51 Wis. 2d 434.

We see nothing in any alleged branch of the telephone company's rules which is ground for dismissal. The telephone company might complain, but we do not believe that defendants have standing to allege breach of those rules as a ground for dismissal.

703 On the evidence produced the court finds:

1. That James Pellitteri, an officer of Tony Pellitteri Trucking Service, Inc., did record conversations he had over the telephone with employees of defendant Waste Management of Wisconsin, Inc.

2. Such recording was done with the knowledge and consent of said James Pellitteri and was furnished by him to the Attorney General.

3. That Tony Pellitteri Trucking Service, Inc. is a competitor of Waste Management of Wisconsin, Inc.

4. That at no time did the State or any of its attorneys, employees or agents engage in electronic eavesdropping of telephone conversations from telephones in defendants' office.

5. That, other than the recording of conversations with James Pellitteri by recording devices attached to his phone or his person with his knowledge and consent as set forth above, there was no electronic eavesdropping, there was no electronic eavesdropping or surveillance conducted by the State or its attorneys, employees or agents.

The court therefore concludes that no illegal electronic surveillance or eavesdropping took place and that no evidence was obtained by the State illegally.

It is therefore ORDERED; That defendant's motion to dismiss on the ground of illegal surveillance is hereby denied.

Dated November 6, 1973.

119 AFFIDAVIT

(Caption and formal parts omitted)

State of Wisconsin — County of Dane: ss.

Michael L. Zaleski, being first duly sworn, on oath deposes and says to the court as follows:

1. That I am an Assistant Attorney General with the Wisconsin Department of Justice and am licensed to practice law in the State of Wisconsin.

2. That I was an attorney for the Grand Jury which handed down the indictment in the instant case.

3. That I executed an oath of secrecy restricting under the penalty of contempt my right to divulge information concerning the Grand Jury.

4. That I have no knowledge of any illegal electronic surveillance relating to these defendants.

5. That any relevant testimony which I might give pertaining to the above-entitled case I believe to be priviged by law.

6. That I believe that I was subpoenaed to testify in this matter for harrassment purposes.

7. That this affidavit is made in support of the accompanying petition to quash the subpoena served on me on behalf of the defendants.

Dated this 12th day of June, 1973.

120 AFFIDAVIT

(Caption and formal parts omitted)

Peter A. Peshek, being first duly sworn, on oath deposes and says that:

He is an Assistant Attorney General with the Wisconsin Department of Justice, being so employed for the past five years and is licensed to practice law in the State of Wisconsin.

In his capacity as an Assistant Attorney General, he is charged with investigating crimes of state-wide in nature, importance and influence.

However, affiant has never investigated any illegal violations of Chapter 133, Wisconsin Statutes.

Affiant has never met any of the defendants to the best of his knowledge.

Affiant has never read any files reference defendants' alleged violations of Ch. 133, Wis. Stats., Dane County Wisconsin.

Affiant has never read in its entirety the indictment issued against the defendants.

Affiant has no personal knowledge of any legal or illegal electronic interception of the defendants in the State of Wisconsin.

Affiant has had no responsibility to supervise any attorneys or agents investigating the defendants' activities in Dane County, Wis.

Affiant's sole purpose for attending the meeting of June 6, 1973 involving Robert Friebert, Robert Sutton, Michael Zaleski, Daniel Milan, Marvin Strawn, Frank Meyers, Paul Gossens and affiant was to provide legal advice to other Department of Justice employes in that affiant is an attorney experienced in the details of Chapter 968, Wisconsin Statutes.

121 AFFIDAVIT

(Caption and formal parts omitted)

State of Wisconsin — County of Dane: ss.

Daniel A. Milan, being first duly sworn, on oath deposes and says to the court as follows:

1. That I am an Assistant Attorney General with the Wisconsin Department of Justice and am licensed to practice law in the State of Wisconsin.

2. That I was an attorney for the Grand Jury which handed down the indictment in the instant case.

3. That I executed an oath of secrecy restricting under the penalty of contempt my right to divulge information concerning the Grand Jury.

4. That I have no knowledge of any illegal electronic surveillance relating to these defendants.

5. That any relevant testimony which I might give pertaining to the above-entitled case I believe to be privileged by law.

6. That I believe that I was subpoenaed to testify in this matter for harassment purposes.

7. That this affidavit is made in support of the accompanying petition to quash the subpoena served on me on behalf of the defendants.

Dated this 12th day of June, 1973.

122 AFFIDAVIT

(Caption and formal parts omitted)

State of Wisconsin — County of Dane: ss.

Paul J. Gossens, being first duly sworn, on oath deposes and states:

1. That I am an Assistant Attorney General with the State Department of Justice, State of Wisconsin, and I am an attorney licensed to practice law in the State of Wisconsin.

2. That I represent the State of Wisconsin in the case pending before this court, *State of Wisconsin* v. *Waste Management of Wisconsin, Inc.*, and *State of Wisconsin* v. *McKinley Standridge*, and I signed the indictment handed down by the Grand Jury in those two cases.

3. That as an attorney for the Grand Jury which handed down the indictment in the instant case, I executed an oath of secrecy pursuant to Wisconsin Statutes not to divulge any information concerning this Grand Jury.

4. That on at least two occasions I was personally threatened by attorneys for the defendants in the above-

captioned case that I would be sued by the defendants. The first threat made to me that I would be sued personally was made by Attorney Allen Samson immediately after I moved the court to have the bail revoked in the case of McKinley Standridge for purposes of his being booked.

The second instance in which I was threatened with a
123 lawsuit by attorneys for the defendants was on June 6, 1973, at approximately 2:00 p.m. in the offices of the Deputy Attorney General of the State of Wisconsin when I, among others, was told by Attorneys Robert Friebert and Robert Sutton that the Department of Justice would have to hire five new attorneys to handle all the lawsuits against us.

5. As a result of the above-stated threats that I would be the object of a personal lawsuit, I believe this subpoena is served upon me to harass and interfere with my effective prosecution of the felony indictments issued by the Grand Jury in Dane County.

6. I have no personal knowledge, direct or indirect, of any illegal activity of any kind, including electronic surveillance, on the part of the Department of Justice or any witnesses of the Grand Jury, or any person who supplied information to the Grand Jury which led to the jury finding probable cause against these defendants.

7. This affidavit is made in support of the accompanying petition to quash the subpoena served on me on behalf of the defendants.

Dated this 12th day of June, 1973.

124 AFFIDAVIT

(Caption and formal parts omitted)

State of Wisconsin — County of Dane: ss.

Marvin I. Strawn, being first duly sworn, on oath deposes and states:

1. That I am an Assistant Attorney General with the State Department of Justice, States of Wisconsin, and I am an attorney licensed to practice law in the State of Wisconsin.

2. That I represent the State of Wisconsin in the case pending before this court, *State of Wisconsin* v. *Waste Management of Wisconsin, Inc.*, and *State of Wisconsin* v. *McKinley Standridge*, and I signed the indictment handed down by the Grand Jury in those two cases.

3. That as an attorney for the Grand Jury which handed down the indictment in the instant case, I executed an oath of secrecy pursuant to Wisconsin Statutes not to divulge any information concerning this Grand Jury.

4. I believe this subpoena is served upon me to harass and interfere with my effective prosecution of the felony indictments issued by the Grand Jury in Dane County.

5. I have no personal knowledge, direct or indirect, of any illegal activity of any kind, including electronic surveillance, on the part of the Department of Justice or any witnesses of the Grand Jury, or any person who supplied information to the Grand Jury which led to the finding probable cause against these defendants.

125 6. This affidavit is made in support of the accompanying petition to quash the subpoena served on me on behalf of the defendants.

Dated this 12th day of June, 1973.

* * * *

127 AFFIDAVIT

(Caption and formal parts omitted)

State of Wisconsin — County of Dane: ss.

Frank A. Meyers, being duly sworn, on oath deposes and says as follows:

That he is Administrator of the Division of Criminal Investigation, Wisconsin Department of Justice, and that this affidavit is for the purpose of disclosing fully to the Court the extent of the State of Wisconsin's knowledge of electronic surveillance in the above captioned action.

That by virtue of his employment affiant has supervisory authority over all agents of the Wisconsin Department of Justice, Division of Criminal Investigation; that certain agents of the Wisconsin Department of Justice conducted an investigation of antitrust activities of the defendants, Waste Management of Wisconsin, Inc., d/b/a City Disposal Company, and McKinley Standridge; and that all of said agents were under the supervision of the affiant.

That affiant has been apprised of all of the results of said investigation by said agents and has personally discussed the details of said investigation with the cognizant agents, all of whom he knows to be truthful and reliable.

That the following is a true and correct recital of the information on file and in the possession of the Wisconsin Department of Justice; furthermore, it is and was the
128 only electronic surveillance of defendants conducted by the Wisconsin Department of Justice ..... known to the Department of Justice.

On May 11, 1972, a special agent of the Wisconsin Department of Justice affixed a T-2 transmitter on the person of X and, by use of the Bell & Howell SK-8 reciever/re-

corder, attempted to record a conversation between X and Peter O. Abeles. Because of equipment malfunction, no conversation was recorded.

On May 31, 1972, the SK-8 was used again by a special agent of the Wisconsin Department of Justice in an attempt to record a meeting between X and Abeles. Because the T-2 transmitter was inoperative, the internal microphone of the SK-8 briefcase receiver/recorder was used. The special agent carried the briefcase into the restaurant where the meeting was to be held, but because of conditions, no intelligible recording was received.

On September 5, 1972, special agents of the Wisconsin Department of Justice recorded a meeting between X, X's mother and Abeles. The meeting took place at the home of X's mother. The T-2 transmitter was affixed to X and the conversation was recorded on the SK-8 receiver/recorder.

On January 16, 1973, a special agent and investigator of the Wisconsin Department of Justice recorded a conversation between X and McKinley Standridge. X had been outfitted with the T-2 transmitter and the SK-8 receiver/recorder was used to record the conversation.

In addition to these attempts, the Department of Justice has received eight (8) separate tapes from X's attorney, who represents X.

Tapes 1 through 5 were received from X's attorney on 3/22/72 and covered the period of 1/01/72 to 2/07/72, as indicated on the individual boxes containing the tapes. The box marked Tape #1 indicates 1/01/72 to 1/25/72; Tape #2 indicates 1/25/72 to 1/31/72; Tape #3 indicates 1/31/72 to 2/08/72; Tape #4 indicates 2/10/72 to 2/23/72; and Tape #5 indicates 2/02/72 to 2/07/72.

Tape #6 was received from X's attorney on 5/01/72 and indicates the time period as 3/14/72 to 4/24/72 and again on 4/27/72.

129 Tape #7 was received from X's attorney on 6/13/72 and the box indicates that it covered the period of 5/01/72 to 5/31/72.

Tape #8 was received from X's attorney on 2/07/73. This tape was not received in a box and no period of time is indicated.

That all surveillance outlined above was conducted only after obtaining the consent of X.

Dated this 11th day of June, 1973.

TRANSCRIPT OF APPEARANCES 6/13/73

(Caption and formal parts omitted)

* * * *

211 ## AFFIDAVIT

(Formal Parts Omitted)

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

Paul J. Gossens, being first duly sworn on oath deposes and says that:

My name is Paul J. Gossens and I am an Assistant Attorney General for the Wisconsin Department of Justice and I am making this affidavit pursuant to an order of the court dated June 14, 1973.

The affiant and Assistant Attorneys General Michael L. Zaleski and Marvin I. Strawn have conducted and

directed the investigation which led to the presentation of evidence resulting in these indictments.

The affiant had supervisory control over and directed all agents of the Wisconsin Department of Justice in their activities relative to the indicting of the defendants in the above-captioned action.

Pursuant to the court order of June 14, 1973, your affiant has personally contacted (a) the Attorney General of the State of Wisconsin; (b) the Deputy Attorney General of the State of Wisconsin; (c) the Administrator of the Division of Criminal Investigation of the Department of Justice of the State of Wisconsin; (d) the supervising attorney of the Criminal Prosecution Unit of the Wisconsin Department of Justice; and (e) the supervising attorney of the Criminal Antitrust Division of the Wisconsin Department of Justice.

212

The affiant has complete access to all Department of Justice records, files and other data concerning the defendants.

The affiant makes this affidavit based upon the aforementioned facts and his personal knowledge.

Neither the Attorney General nor any of his assistants or agents at any time obtained any warrant or other process for electronic surveillance involving the defendants and neither the Attorney General nor any of his assistants or agents has any knowledge of any such warrant or process.

Neither the Attorney General nor his assistants or agents have ever destroyed any material relating to electronic surveillance nor has the Attorney General nor any of his assistants or agents lost any materials relating to electronic surveillance of the defendants.

No recording obtained from electronic surveillance was in any way used as evidence before the Dane County Grand Jury which issued the indictments in the above-captioned action.

The grand jury which issued the indictments was advised that one of the witnesses had on the advice of his attorney, recorded telephone conversations with the corporate officers of defendant Waste Management of Wisconsin, Inc. The contents of the recordings were not disclosed to the grand jury.

That the corporate defendant, its agents, officers, employees or the attorneys of any of the above have not been the subject of any electronic surveillance at the instance of or under the control of the Attorney General, any of his assistants or agents or any informants supplying information to the Department of Justice since these defendants were indicted.

4106

EXCERPTS FROM PETITIONER'S MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL

(Caption and Formal Parts Omitted)

The defendant Waste Management of Wisconsin, Inc. d/b/a City Disposal Co. by its attorney Robert H. Friebert hereby moves the Court pursuant to §974.02, Wis. Stats. to set aside the conviction of the defendant in the above captioned case and for a new trial upon the following grounds:

1. The indictment as presented by the grand jury did not charge a crime against the laws of the State of Wisconsin as more fully set forth in Motion No. 1 dated April 15, 1975.

2. The amendment to the indictment as entered by Judge Jackman on June 4, 1973 was not proper, not founded in law and did not charge a crime under the laws of the State of Wisconsin and is further prejudicial to the defendant as is more fully set forth in Motion No. 2 of the defendant dated April 15, 1975.

* * * *

4. The indictment in the first trial before Judge Jack-
4107 man was improperly amended to read "commencing in November of 1971" instead of "commencing in 1970" as is more fully set forth in Motion No. 4 dated April 15, 1975.

5. The defendant because of the improper presentment of the indictment was denied its right to notice of the charges, is not able to plead an acquittal of conviction as a bar to further prosecutions and the defendant was denied its right to defending a charge as presented by the grand jury as is more fully set forth in Motion No. 5 dated April 15, 1975.

* * * *

10. With respect to the electronic surveillance issue, the defendant was denied a full testamentary hearing with respect to this issue; the State was not ordered to
4108 give full disclosure about any electronic surveillance; the State was not ordered to reveal all of their logs which contained the names of the defendants, witnesses, attorneys, officers of the defendant corporation, their employes, their agents, their attorneys as well as persons similarly related to subsidiary corporations, the parent corporation, other subsidiaries of the parent corporation; the State was not ordered to give full and complete disclosure of all warrants from any jurisdiction as well as all transcripts and tapes; the State was not ordered to provide a list of

all witnesses who have knowledge, either personally or by hearsay, with respect to any electronic surveillance of any nature or sort whatsoever with respect to the defendants; the denial of an order requiring the State to provide a list of any and all persons who allowed themselves to be parties to any electronic surveillance with respect to any of the defendants, their officers, agents, employes and attorneys or of their parent and subsidiary corporations or any subsidiaries of the parent corporation; the denial of an order requiring the State to advise the defendants whether any material with respect to electronic surveillance was either destroyed or lost; the denial of an order requiring the State to advise the defense whether electronic surveillance was mentioned to the grand jury; the denial of an order requiring the State to advise whether any of the defendants, their agents, employes, officers, etc. are presently the subject of any electronic surveillance; the denial of an order requiring the prosecutors to personally seek the answers to all of these inquiries from all sources within the Justice Department and District Attorneys in the State of Wisconsin and to personally
4109 vouch to the Court that they have made such an inquiry and the results of that inquiry; the denial of an order requiring affidavits for the prosecutors in accordance with the provisions of *Korman;* all as more fully set forth in Motion No. 10 dated April 15, 1975.

* * * *

20. The Court erred in failing to dismiss the case because the defendant was not provided with a preliminary hearing as is more fully set forth in Motion No. 22 dated April 15, 1975.

21. The Court erred in not dismissing the indictment because the grand jury was not told about exculpating

evidence and therefore James Pellitteri was allowed to testify falsely before the grand jury as is more fully set forth in Motion No. 23 dated April 15, 1975.

* * * *

23. The failure of the State to produce all exculpatory evidence or evidence which would tend to diminish the culpability of the defendant or would be helpful in assisting the defense in the preparation of their case for trial,
4111 and, in particular, the failure to disclose all of the grand jury transcripts as is more fully set forth in Motion No. 28 dated April 15, 1975.

* * * *

25. The Court erred in not granting the motion of the defendant to dismiss the case due to the misconduct of the prosecutor during the course of the first trial as is more fully set forth in Motion No. 32 dated April 15, 1975.

26. The Court erred in not granting the motion of the defendant to dismiss the indictment on the grounds that jeopardy had previously attached and in the interests of justice as is more fully set forth in Motion No. 34 dated April 15, 1975.

27. The Court erred in allowing any amendments whatsoever to the indictment as presented by the grand jury and, in particular, erred in allowing the two amendments to the charging paragraph of the indictment.

* * * *

4112 31. The Court erred in overruling the objection to time constraints placed upon defendant with respect to testimony concerning analysis of tapes by Stanford Research Institute as is more fully set forth in a motion to the Court dated June 23, 1975.

32. The Court erred in overruling the objection made by the defendant to the time constraints placed on counsel with respect to polygraph testimony as is more particularly set forth in a motion to the Court dated June 23, 1975.

33. The Court erred in refusing to allow impeachment questions in the pre-trial hearings as is more particularly set forth in the objection to the Court dated June 23, 1975, and set forth throughout the proceedings wherein the Court refused to allow the defense to impeach the credibility of witnesses by continuously asserting that these were matters for the trial.

34. The Court erred when it continued to use hearsay evidence with respect to the reports of Stanford Research Institute and John R. Reid and Associates as is particularly set forth in a motion dated June 23, 1975.

35. The Court erred in overruling the objection made by the defense that the trial date firmness was compelling time restraints on pre-trial hearings as is more particularly set forth in a motion to the Court dated June 23, 1975.

* * * *

37. The Court erred in denying the motion of the defendant to recall members of the Pellitteri family and other witnesses after expert testimony as is more
4113 particulary set forth in a motion to the Court dated June 23, 1975.

38. The Court erred in denying a motion of the defendant for a new arraignment due to the double amendments made to the indictments as is more particularly set forth in a motion to the Court dated June 23, 1975.

39. The Court erred in denying a motion for a preliminary hearing due to the amended indictment as is

more particularly set forth in a motion to the Court dated June 23, 1975.

40. The Court erred in overruling the objection of the defense of the appearance of having decided issues before completion of the hearing and, in the alternative, for recusal of judge as is more particularly set forth in a motion to the Court dated June 23, 1975.

41. The Court erred in denying a motion for adjournment of hearing dates and for adjournment of trial date made by the defense on June 23, 1975 and as more particularly set forth therein.

42. The Court erred in denying the motion for adjournment of hearing dates and trial date in a motion dated June 27, 1975 as is more particularly set forth in that motion.

43. The trial court so insinuated itself into the pre-trial hearings by its own examination of witnesses that the defendant was denied its right to due process and equal protection of the laws and it was denied its right to counsel in that counsel was not allowed to present evidence in a manner in which he wanted to present evidence to the Court and was constantly interrupted by the Court throughout the pre-trial proceedings in such a way that the proceedings in the pre-trial hearings became inquisitional rather than adverse proceedings. Fur-
4114 thermore, the Court erred in continuously rephrasing questions and continuously interjecting its own observations and its own views as to relevancy and materiality to such an extent that the role of counsel became one of a mere observer of events rather than as a participant in an adversary setting. In such a manner, the defendant was denied its opportunity to present its evidence in its case in a fashion which defendant's counsel believed best

presented the case with respect to his client's interests. Furthermore, the hearings were unduly hampered and cut down in their scope of inquiry.

44. It was error for the Court not to dismiss the case due to prosecutorial misconduct before the grand jury as is more particularly set forth in Motion No. 1 dated July 11, 1975.

45. The Court erred in failing to dismiss the case due to prosecutorial misconduct at the prior trial with respect to when Beecher first met Pellitteri and the failure of the prosecutors to disclose Jim Pellitteri's protection of his uncle, Phil Pellitteri, as is more fully set forth in Motion No. 3 dated July 11, 1975.

46. The Court erred in failing to dismiss the case due to the deliberate failure of the State to divulge grand jury transcripts prior to the first trial as is more particularly set forth in Motion No. 4 dated July 11, 1975.

* * * *

4115 51. The Court erred in failing to dismiss the case due to prosecutorial misconduct both individually and cumulatively as follows:

(a) The cross examination at the first trial regarding previous alleged activities in bid rigging by the defendant corporation;

(b) The mention of tape recordings before the grand jury;

(c) The eliciting of certain testimony before the grand jury as is more fully set forth in Motion No. 1 dated July 11, 1975;

(d) The improper claim of privilege during the testimony of Mr. Zaleski and Mr. Meyer;

(e) The failure to advise the defense that James Pellitteri had testified that he got into an agreement to protect his uncle, Phil Pellitteri;

(f) The statement of the prosecution that the first time they heard about any such arrangement with Phil Pellitteri was during the testimony of Bruce Gillman when, in fact, there was testimony before the grand jury;

(g) The failure of the prosecution to properly advise the defense at the first trial regarding the statements of Beecher and James Pellitteri with respect to the first meeting;

4116 (h) The changed stories which surround the manner in which the Attorney General found out about the meeting between Schultz and Standridge at Namio's which includes within it a pattern of deception and deliberate failure to correct inaccurate testimony and attempts to hide the truth, all of which prosecutorial misconduct is fully set forth in a motion made to the Court with respect to prosecutorial misconduct, said motion being dated July 15, 1975.

* * * *

54. It was error for the Court not to dismiss the case because the defendant made out a prima facie case of electronic surveillance; this prima facie case was never rebutted by the State; the State never explained how it found out about the meeting between Schultz and Standridge at Namio's without the use of electronic surveillance; the taping and divulging of the tapes to the Attorney General as admitted by James Pellitteri to have been one-party consent tapes was done in violation of state and federal law in that it was accomplished for purposes of injuring the defendant corporation or committing a tortious act against the corporation.

* * * *

148. The Court erred at page 918 of the transcript, *et seq.*, in its failure to give the instruction proffered by the defense which appears on that page and instead giving
4132 the instruction which appears at page 12 of the instructions regarding the per se standards of a restraint of trade. The Court further erred with respect to this instruction by failing to give the Devitt and Blackmar instruction contained at §2314 which was tendered to the Court at page 921 of the transcript.

149. The Court further erred at page 922 of the transcript by not clearing up the sentence with respect to the so-called per se agreements by not showing in greater detail that there had to be an agreement and that this could not be done unilaterally. See page 12, proposed instructions, pages 10-11, Instructions.

150. See page 923 of the transcript. The Court erred when it instructed the jury that the only thing necessary in an antitrust conspiracy case is that there be an agreement and that there need not be acts done in furtherance of any such conspiracy. See discussion at page 926 of the transcript and page 16 of proposed instructions, page 14, Instructions.

151. The Court also erred in giving the second paragraph on page 16 of the proposed instructions, page 14, Instructions, in that such instruction is repetitious. See page 926 of the transcript.

152. The Court erred at pages 934-935 of the transcript when it allowed the insertion of an instruction that a person intends the natural and probable consequences of his acts. See page 16, Instructions.

153. The Court erred when it kept in the second paragraph of page 22 of the proposed instructions, page

18, Instructions, with respect to the instruction that there is no need to have consciousness of wrongdoing. See pages 936-938 of the transcript.

* * * *

157. The Court erred with respect to instructing the jury about that a person intends the natural and probable and usual consequences of his deliberate acts. See page 949 of the transcript. See page 16, Instructions.

* * * *

159. The Court erred when it rejected each and every one of the defendant's requested instructions 1 through 21 at page 1039 of the transcript.

160. The Court erred at page 1053 of the transcript when it limited the argument of counsel and would not allow counsel to argue that ¶20 of the indictment had not been proven, i.e. that the State had not proven an effect upon commerce.

4134 161. The Court erred when it did not give the instructions which were offered initially at page 354 of the transcript.

162. The Court erred during the closing argument when it limited the impact of the accomplice instruction to evidence obtained while the accomplice was an accomplice and in effect stated that the corroboration warning was not applicable when the accomplice became an informer. See page 2 of the excerpt of final argument.

163. The Court erred when it did not grant the defendant's motion for mistrial or for judgment when Mr. Strawn stated in interruption of the argument of defendant the following:

"You know very well why we couldn't get evidence on that."

* * * *

4135 164. The Court erred when it refused to instruct the jury in accordance with the various requests by defense counsel so that the effect of the improper statement of the prosecuting attorney would be limited and that no prejudicial impact could be derived from this statement of the prosecuting attorney. See excerpts of proceedings, July 30, 1975.

165. The Court erred at page 7 of the excerpts of proceedings, July 30, 1975, wherein the Court limited argument to refrain from discussion of handwriting and fingerprints.

* * * *

167. The Court erred when it gave any instruction to the jury which was objected to by defense counsel and the Court further erred when it did not give any instruction offered by defense counsel.

* * * *

169. The Court erred in all of its findings of fact and conclusions of law with respect to electronic surveillance in its decision dated July 17, 1975.

170. The Court erred in its other decision dated July 17, 1975 with respect to all of its findings of fact and con-
4136 clusions of law regarding the reasons why Mr. Gossens asked an improper question in the first trial and the effects of the asking of that improper question. A dismissal should have been granted.

Dated at Milwaukee, Wisconsin this 19th day of August, 1975.

EXCERPTS FROM PETITIONER'S BRIEF TO WISCONSIN SUPREME COURT

* * * *

A. The State, By Covering Up And Confusing The Manner In Which It First Learned About A Meeting Between Standridge And Schultz At Namio's Created An Unrebutted Presumption Of A Wiretap.

* * * *

C. The Defendant Was Denied Fair And Impartial Pretrial Hearings.

* * * *

XII.

PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

* * * *

In the first trial, Mr. Gossens, while cross-examining Standridge, smeared the corporation with an improper and wholly unfounded question:

> "Did you know that Waste Management or by its previous name had ever been involved in bid rigging?" (R. 1367, A. 655).

Waste under its present or former name has never been convicted of bid rigging.[39] Timely objection was made and sustained. A motion for mistrial and acquittal was denied. Both J. Jackman and J. Maloney agreed that this question was absolutely improper. (R. 1414, 2613, A. 659-60, 1370).

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[39] Mr. Grossens' question was charged with the implication of a prior conviction. As he revealed later, he was referring to a civil proceeding in Milwaukee which did not result in judgment. Thus, not only was the question improper, it was not even based on fact. (R. 1410-5, A. 655-61).

In *State* v. *Calhoun,* 67 Wis. 2d 204, 226 N.W. 2d 504 (1975), the Court recognized that the State cannot proceed to a second trial if prosecutorial misconduct was based upon "a fear that the jury was likely to acquit the accused." *Id.* at 223, quoting from *United States* v. *Tateo,* 377 U.S. 463, 468 (1964), referring to *Gori* v. *United States,* 367 U.S. 364 (1961). This rule evolved from considerations of both collateral estoppel and double jeopardy.

In the first trial the State capitalized on its clear prosecutorial misconduct. The case was always close.[40] The defendant was entitled to a verdict by the first jury unencumbered by such deliberate misconduct.

By obtaining a second trial, the State profited by its misconduct. The defense had been totally divulged. As a matter of policy and previous decisions, the conviction should be reversed because of the misconduct. The State should not be allowed to proceed with another trial. This would be a most effective way to prevent further misconduct of this nature.

* * * *

E. It Was Error for the Court to Instruct That the Jury Could Convict If They Could Find That the Defendant Had Committed a Crime Merely Upon Proof That an Agreement Had Been Reached Because This Instruction Effectively Amended ¶20 of the Indictment.

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[40] The first jury hung. J. Maloney also indicated that the second trial could go either way. (R. 2660, A. 2078-9).

EXCERPTS FROM STATE'S BRIEF TO WISCONSIN SUPREME COURT

XII. There Was No Prosecutorial Misconduct In This Case Which Could Conceivably Justify The Reversal Of Defendant's Conviction.

* * * *

* * * Defendant contends there was one such instance: The State's question to Standridge during the first trial inquiring whether he knew that defendant corporation had engaged in previous "bid rigging." (R. 1367, A. 655). Defendant argues that this question, objection to which was properly sustained at the time and for which a curative admonition was given to the jury by Judge Jackman, should have prevented the State from prosecuting defendant a second time after the first trial ended with a hung jury and a mistrial.

This argument rests upon a horrendous misapplication of ruling precedent and is utterly without merit. The principle of law which defendant has so completely distorted is one developed to deal with intentional prosecutorial misconduct designed to cause a mistrial so that the State might have a better opportunity to obtain a conviction at a second trial. The principle was born in *United States v. Tateo* (1964), 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed. 2d 448, where the Court suggested that double jeopardy might bar a second prosecution after a mistrial granted during a trial where it appeared that the "prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused." 377 U.S. at 468, n. 3. This principle was subsequently noted with approval in *United States v. Jorn* (1971), 400 U.S. 470, 485, n. 12, 91 S.Ct. 547, 27 L.Ed. 2d 543, and later accepted and applied by this Court in *State v. Calhoun* (1975), 67 Wis. 2d 204, 223-226, 226 N.W. 2d 504.

By using an incomplete quotation of the *Tateo-Calhoun* principle at page 77 of its brief, defendant has made it appear that this doctrine stands for the propsition that there may be no retrial of a defendant, no matter how the first trial ended, where there was prosecutorial misconduct upon the first proceeding. The *Tateo-Calhoun* principle does not stand for such a proposition, and its utter inapplicability to the instant case should be obvious. It can apply only where the first trial ends in a mistrial because of the instance of prosecutorial misconduct, if the misconduct was intentionally designed to abort the proceedings because of the State's fear that the case was likely leading to a jury verdict of aquittal.

Mistrial was ordered in defendant's first trial only after the case had gone to the jury, and after the jury was unable to reach a verdict. Mistrial was ordered, therefore, not because of prosecutorial misconduct, but because of the hung jury. The *Tateo-Calhoun* principle does not bar the trial of defendant, as the circuit court properly ruled in this case. (R. 2613, A. 1370) Defendant has failed to demonstrate any prosecutorial misconduct in the proceedings below which could conceivably warrant a reversal of its conviction.

* * * *